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# In the Supreme Court of the United States

OCTOBER TERM, 1934

No. 566

RAILROAD RETIREMENT BOARD ET AL., PETITIONERS

*v.*

THE ALTON RAILROAD COMPANY, ET AL.

*ON CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA*

## BRIEF FOR THE PETITIONERS

### OPINION BELOW

The only opinion previously rendered in this case is that of the Supreme Court of the District of Columbia (R. 261), not yet reported.

### JURISDICTION

The final decree of the Supreme Court of the District of Columbia was entered on October 30, 1934 (R. 279). Appeal was taken to the Court of Appeals (R. 280), and the case was docketed in that Court on November 13, 1934 (R. 283). The case was not submitted to the Court of Appeals, but a

petition for certiorari was filed in this Court on December 7, 1934, and was granted December 13, 1934 (R. 285).

The jurisdiction of this Court rests on Section 240 (a) of the Judicial Code, as amended by the Act of June 13, 1925, 43 Stat. 938.

## QUESTIONS PRESENTED

The following questions are presented by the decision of the lower court:

1. Whether the Railroad Retirement Act is unconstitutional, under *The Employers' Liability Cases*, because it applies to *all* employees of carriers subject to the Act, including employees claimed not to be directly engaged in interstate transportation.

2. Whether the Act, in providing for the computation of annuities on the basis of years of service, is unconstitutional because years of service rendered prior to the enactment of the statute are included.

3. Whether that provision of the Act is unconstitutional which includes among the employees subject to the Act those who were in the service of the carriers within one year prior to its enactment.

In respondents' memorandum filed in response to the petition for certiorari, it is indicated that they will urge in this Court in support of the decree below, in addition to the grounds on which the lower court based its decision, each of the other grounds on which the Act is alleged in the bill of

complaint to be unconstitutional. Accordingly, the following additional questions will be considered in this brief:

4. Whether the Retirement Act is within the power of Congress under the Commerce Clause, as an act intended, and reasonably calculated, to promote efficiency and safety, to improve labor conditions and relations, and to foster and protect the national transportation system.

5. Whether the Retirement Act is unconstitutional, in whole or in part, because it provides that employees who leave the service before the retirement age nevertheless retain the right to receive annuities, computed upon the years of actual service, payable when they do attain the retirement age.

6. Whether the Act is unconstitutional, in whole or in part, because it provides for voluntary retirement, with reduced annuity, at the conclusion of thirty years of service regardless of whether the employee has attained the compulsory retirement age.

7. Whether that provision of the Act is unconstitutional which gives employee representatives (duly designated under the Railway Labor Act) the option of participating in the retirement and pension plan established by the Act, provided that they pay into the retirement fund sums equivalent to the contributions required to be made, under the Act, by both employee and employer.

8. Whether the Act is unconstitutional because of its so-called "pooling" provisions, that is, (1) because it provides for the payment of retirement annuities out of a common fund to which all carriers subject to the Act and their employees are required to contribute on the basis of a percentage of wages, and (2) because it provides for the payment of a retirement annuity to each employee on the basis of his combined periods of service with any carriers subject to the Act.

9. Whether the Retirement Act interferes with the liberty of the carriers to contract with their employees with respect to wages.

10. Whether the Retirement Act is unconstitutional "under existing circumstances" by reason of the present financial condition of the carriers.

## SUMMARY OF STATUTE INVOLVED AND LEGISLATIVE HISTORY

The Railroad Retirement Act (Act of June 27, 1934, c. 868, 48 Stat. 1283) is set forth in the Appendix (*infra*, pp. 157–170).

The Act sets up a retirement and annuity system for all employees of all carriers by railroad subject to the Interstate Commerce Act. The purposes of the Act, as stated in Section 2 (a), are to provide "adequately for the satisfactory retirement of aged employees", to promote "efficiency and safety in interstate transportation", and to make possible "greater employment opportunity

and more rapid advancement of employees in the service of carriers."[1]

The retirement and annuity system established by the Act applies to all persons employed by a carrier subject to the Act after its enactment, and also to all persons who were employed by such a carrier within one year before the enactment of the statute (Sec. 1 (b)). Retirement is made compulsory at the age of 65, but may be extended by written agreement between the carrier and employee for successive periods of one year each until the age of 70 (Sec. 4). Each employee who has attained the age of 65 (and who does not by agreement with his employer continue in service) is entitled to receive an annuity calculated by the application of specified graduated percentages of his average monthly compensation (excluding all over $300) to the number of years of his service, not exceeding 30 (Sec. 3). Any employee who has completed 30 years of service may retire before the age of 65, but in that event the annuity is reduced by one-fifteenth for each year that the employee is below the age of 65 (unless the retirement was due to physical or mental inability to continue in active service) (*Ibid.*). Any representative of an em-

[1] Section 2 (a) also provides: This Act shall be administered and construed with the intent and to the purpose of providing the greatest practicable amount of relief from unemployment and the greatest possible use of resources available for said purpose and for the payment of annuities for the relief of superannuated employees.

ployee organization designated under the Railway Labor Act who has been in the service of a carrier is given the option of continuing or becoming a beneficiary under the Act provided that he contributes to the retirement fund sums equal to the employee and employer contributions (Secs. 1 (b), 7).

Funds necessary for the payment of annuities and for the expenses of administering the Act are to be raised by contributions from employees and carriers (Sec. 5). The contribution of employees is to be a certain percentage of their compensation and the contribution of each carrier twice the contribution of its employees (*Ibid.*). The Railroad Retirement Board set up to administer the Act may determine from time to time what percentage is necessary to provide the needed funds, but until the Board otherwise determines the employee contribution is to be 2% of compensation (*Ibid.*). Employee contributions are to be deducted by each carrier from the compensation of its employees and are to be paid by the carrier, together with its own contributions, into the Treasury of the United States quarterly, or at such other times as ordered by the Board (*Ibid.*). Moneys so paid into the Treasury are to be kept in a separate "railroad retirement fund" (Sec. 8).

The Board is given general authority to administer and enforce the Act, including power to require carriers and employees to furnish it necessary information and records and power to require

such advance payments by carriers as may be necessary to put the Act into operation (Sec. 9 (b)). The first quarterly payment under the Act was due November 1, 1934, and the first annuity payments thereunder are to begin February 1, 1935 (Secs. 1 (1), 3).

*The Legislative History of the Retirement Act.*— The legislative history of the Retirement Act dates back to February 1931, when the first bill embodying a compulsory retirement and pension plan for railways was introduced in Congress (S. 6196, by Senator Wesley Jones, 71st Cong., 3rd Sess.). In 1932 bills were introduced in the Senate by Senator Wagner and Senator Hatfield, and corresponding bills were introduced in the House by Representative Crosser and Representative Keller.[2] Hearings on the Wagner and Hatfield bills were held from January 11 to January 19, 1933.[3] In March 1934 Senators Hatfield and Wagner introduced a joint bill (S. 3231) upon which further hearings were held from April 23 to April 26.[4] On May 11,

[2] S. 3892 by Senator Wagner; S. 4646 by Senator Hatfield; H. R. 10023 by Representative Crosser; H. R. 9891 by Representative Keller, all introduced in the 72nd Cong., 1st Sess.

[3] Hearings before Subcommittee of Committee on Interstate Commerce, United States Senate, 72nd Cong., 2d Sess.

[4] Hearings before a Subcommittee of Committee on Interstate Commerce, United States Senate, 73rd Cong., 2d Sess. A bill introduced in the House by Representative Crosser was given a hearing before the House Interstate Commerce Committee on June 8, 1934. Hearing before Interstate Commerce Committee, House of Representatives, 73d Cong., 2d Sess.

1934, the bill as amended was favorably reported to the Senate, the Committee Report (Senate Report No. 974, 73rd Cong., 2nd Sess.) stating among other things (pp. 1–2, 4):

> It is obvious that retirement of any considerable number of the older employees will make possible greater employment opportunity and will tend to promote efficiency and safety in interstate transportation.
>
> * * * * *
>
> The record shows that there is now some form of retirement pension plan upon 90 percent of the railroad mileage in the United States. Such plans, however, are not by any means satisfactory either to the railroads or to railroad employees. In most part the pensions provided are inadequate and the cost to the railroads is mounting year by year. This plan contemplates the possibility of determining from the actual experience such fundamentals as are necessary to the construction of a sound reserve plan.
>
> * * * * *
>
> It is a question as to what extent, if any, the payment of pensions to aged employees actually increases operating costs.
>
> Without a satisfactory retirement system these aged employees are often continued in the service when it would be in the interest of economical operation to retire and pay them pensions.
>
> If it be good business judgment to replace worn-out and depreciated equipment with

> new and efficient equipment, it is equally in the interest of efficient and economical operation to retire those employees who have worn themselves out through long years of arduous toil in the performance of faithful service to the industry and thereby bring into the industry that proportion of younger and more active employees.
>
> If this be done, it will not only result in benefit to the industry, but will serve to extend to these aged employees the satisfaction of a well-earned reward which has been paid for by years of their devotion to the service.

The bill, S. 3231, as amended, was unanimously approved by the Senate in a record vote with 66 Senators voting; in addition 26 absent Senators were recorded as favoring the bill (Cong. Rec., Vol. 78, p. 11489). When reported out of conference, made necessary by disagreement between House and Senate bills, it was approved without record vote in both the Senate and the House, and was signed by the President on June 27, 1934 (Cong. Rec., Vol. 78, pp. 12001, 12160, 12455).

**STATEMENT**

This suit was instituted by respondents (134 Class I railroads, two express companies, and the Pullman Company) to test the constitutionality of the Railroad Retirement Act. The Railroad Retirement Board and the members thereof, petitioners here, were named as defendants. At the time

of filing the suit the Railroad Retirement Board had not yet commenced to function, and the administration of the Act by the Board was not in question.

Respondents filed their bill (R. 1), petitioners filed an answer (R. 22) which the court below said raised no serious issue of fact (R. 261), and the case came on for hearing in the Supreme Court of the District of Columbia on respondents' application for a temporary injunction (R. 261). By agreement of counsel the hearing was held upon affidavits, copies of which were exchanged by the parties prior to the hearing (R. 29).[5] At the conclusion of the hearing it was stipulated that the hearing should be the final hearing in the case (R. 261).

*The decision below.*—The court filed a memorandum opinion stating the conclusions which governed its decision (R. 261, 262). The court held that the Act exceeds the power of Congress because it applies to *all* of respondents' employees, "making no distinction between those [employees] engaged in interstate commerce and those not so engaged" (R. 263–264). It also held that the inclusion, in providing for the computation of annuities on the basis of years of service, of years of service rendered prior to the adoption of the Act consti-

[5] Numerous objections were filed by respondents to the affidavits presented by petitioners (R. 226–230), which objections were overruled, exceptions being noted (R. 153, 226).

tutes a taking of property without due process of law (R. 264). These provisions thus held invalid were held to be inseparable and incapable of elimination without destroying the entire scheme and purpose of the Act (R. 273). The court further held the Act invalid insofar as it applies to persons who had been employed within a year prior to its passage and who do not subsequently return to railroad service; but it held that this provision is separable and that its unconstitutionality does not impair the validity of the statute as a whole (R. 264, 273).

The court also made findings of fact and conclusions of law in pursuance of Equity Rule 70½ (R. 265, 273).[6] The final decree entered in the court below declared the Railroad Retirement Act unconstitutional and permanently enjoined petitioners from making any order or taking any other action designed to compel respondents to comply with the Act (R. 279).

*The record.*—The evidence will be stated and analyzed in the argument. At this point, however, it is desirable to indicate in a general way the character of the evidence contained in the record.

[6] The court adopted largely the proposed findings of fact submitted by respondents by indicating at the conclusion of each paragraph its approval thereof; such changes as were made by the court are indicated in the record (R. 265–273). The conclusions of law were made independently by the court (R. 273–274). The requests for conclusions of law filed by respondents are contained in the record at page 274 *et seq.*

*Evidence for respondents.*—Respondents' affidavits in chief (as distinguished from those in rebuttal) concern themselves to a substantial extent with figures and data intended to support the facts of a statistical nature alleged in the bill of complaint. Statistics are presented of railway employment in 1932, showing the number of employees at various ages (R. 30 *et seq.*, 60–61). Evidence is presented with respect to the number of employees over seventy years of age (R. 31, 56) and their distribution among the several respondents (R. 34); the number of employees having thirty years of service with individual carriers (R. 33); and the number of employees who left railroad service during the year preceding the enactment of the Act and who have not returned (R. 49, 58–59, 137–138). The number of persons annually discharged for cause is shown (R. 33), as well as the number of former railroad employees who have not been in the service within the year prior to the enactment of the Act (R. 139–140). Evidence relative to the comparative ages of railroad employees and official employee representatives is given (R. 45, 149), actuarial data concerning phases of the cost to the railroads of the Retirement Act (R. 130–132, 136–137), and evidence bearing upon the extent of superannuation among railroad employees (R. 133–136). One affidavit discusses the increased efficiency of the railroads in recent years (R. 72–75); the same affidavit and

another deal with increased safety in rail transportation in recent years (R. 75–76; 150–153).

Considerable evidence is devoted to showing the number of employees who, it is claimed, are not engaged in interstate commerce (R. 47, 58, 59). Ten of the respondents' affidavits concern themselves exclusively or largely with the description of 16 classes of railway employees who are claimed not to be engaged in interstate commerce (R. 62, 68, 71, 76, 93, 97, 100, 105, 109, 112). Two instances are given of employees engaged in the operation of coal mines owned by carriers (R. 115, 117); the character of the suburban passenger service of other carriers is indicated (R. 118, 120, 121, 123); and the ownership by certain carriers of securities, real estate, and so forth is shown, and that some employees are occupied in handling the same (R. 124, 125, 126, 128, 129).

Statistics are given tending to show that the respondents comprise substantially all the Class I carriers, and that the ratios of their employees, payrolls, and total operating revenues respectively to those of all railways are in each case in excess of 97 percent (R. 37).[1]

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[1] The text of the record giving the ratio of respondents' employees to those of all railroads as "93.7%" is a printer's error. The table on the same page gives the correct percentage as 97.3.

"* * * For the purposes of accounting for operating expenses, carriers operating steam railways shall be divided into three classes * * * Under Class I are included all

In support of the allegations of the bill of complaint with respect to alleged hardship, statistics are presented showing the number of railroads in the hands of receivers or trustees in bankruptcy (R. 35–37), railroad incomes, profits and losses (R. 38–40, 46), prospective increased labor and materials costs (R. 41, 42, 43–44, 141–143), and the extent to which freight and passenger traffic is handled by non-railway carriers (R. 44–45).

*Evidence for petitioners.*—Petitioners' affidavits are devoted mainly to describing pertinent conditions upon the railroads heretofore existing, to pointing out the inadequacies of the existing retirement and pension systems and the need for legislation such as that embodied in the Retirement Act. The essential facts are epitomized in the affidavit of Mr. Joseph B. Eastman, Federal Coordinator of Transportation, who concludes that a "compulsory, automatic, and uniform retirement and pension system for the whole railway industry is in my opinion desirable" (R. 153, 155).

The affidavit of Mr. Murray W. Latimer (R. 162), Chairman of the Retirement Board and one of the petitioners in this case, discusses the history and causes of old-age dependency (R. 163–168),

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carriers having annual operating revenues above $1,000,000 * * * The classification of the carriers shall be based upon their operating revenues for the latest completed fiscal year * * *" Interstate Commerce Commission, *Condensed Classification of Operating Expenses of Steam Roads*, Issue of 1914, p. 3.

the history of retirement and pension systems, among railways and in other industries, in foreign countries and in the United States (R. 168–172). He analyzes the existing voluntary railway pension systems to show their deficiencies (R. 172–180) and discusses pertinent provisions of the Railroad Retirement Act (R. 182 *et seq.*). This affidavit is supplemented by another affidavit of Mr. Latimer (R. 224–225) and by the affidavits of other persons familiar with railway labor conditions (R. 190, 192, 195, 198). Two affidavits present cost data based upon actuarial studies (R. 206, 214). Petitioners also presented two affidavits of labor executives, who dispute the contentions of respondents that the existing pension systems tend to promote employee loyalty (R. 221, 223). Petitioners also introduced in evidence a pamphlet dealing with the earnings and standard of living of railroad employees during the depression (R. 219); and a statement showing dividends declared by Class I railroads during the years 1913 to 1933 (R. 221).

*Rebuttal evidence for respondents.*—Respondents' rebuttal affidavits comprise an affidavit referring to negotiations dealing with the settlement of the last wage controversy between the railways and their employees and discussions between the railways and employees with respect to retirement legislation (R. 230–233); an affidavit of a physician for one of the railways relative to the practice of that railroad to make periodical physical exami-

nations of its employees (R. 233); and fourteen affidavits of presidents and other high executives of the respondents stating that only very limited benefits were derived from the existing voluntary pension systems and expressing the view that the Railroad Retirement Act will be destructive of these benefits (R. 235–260).

### SPECIFICATION OF ERRORS TO BE URGED

Petitioners will rely upon each of the errors assigned in support of their appeal from the final decree entered in the trial court (R. 280–281).

### SUMMARY OF ARGUMENT

#### I

#### PURPOSES OF RETIREMENT PLANS IN GENERAL

(A) *Summary of development.*—In almost all countries, railroads have been the first to provide for old-age pensions for their employees. Railway pension plans were adopted later in this country than abroad, but by 1927 railroads in the United States employing approximately 82.4% of all railway employees had voluntary pension systems. The adoption of such systems extended rapidly into other industries, until in 1932 some 420 companies employing about 4,000,000 persons had pension systems in operation.

(B) *Motives in adoption of retirement plans.*—Retention of superannuated workers in the service is detrimental to the efficiency of industry. Not only does the employee's own output suffer by rea-

son of old age, but in highly organized industries the declining activity of particular employees causes the slowing down of the work of the entire force. The retention of older workers also blocks the path to the promotion of younger workers and impairs their morale. Humane reasons, and the danger of incurring the resentment of employees and of the public, have prevented employers from turning out, without means of support, aged employees who have become inefficient. This situation is largely responsible for the adoption of pension plans. While employers have not always emphasized the same advantages, an analysis of the motives underlying the adoption of pension plans discloses the tendency to emphasize to an increasing extent the elimination of waste and the promotion of efficiency and economy. Experts and prominent organizations representative of large business interests have urged the adoption of pension plans as an aid to the profitable and efficient conduct of business enterprises. National, state, and local governments have also recognized the need for, and the beneficial effects of, retirement and pension systems, in the interest of promoting efficiency and economy. Courts which have been presented with the issue have justified retirement and pension systems on the same grounds. In the light of the history of the development of retirement and pension systems, Congress was justified in viewing such systems as a means of promoting efficiency and economy.

## II

### THE RETIREMENT ACT CALCULATED TO PROMOTE EFFICIENCY AND SAFETY AND TO IMPROVE LABOR CONDITIONS AND RELATIONS

(A) *Need for a sound compulsory railroad retirement system.*—The Retirement Act is calculated to overcome the inadequacies of existing railroad pension plans which have prevented those plans from accomplishing the objectives of sound retirement systems. The inadequacies of the existing plans, brought to the attention of Congress by the employees, were fully revealed in studies made under the supervision of the Federal Coordinator of Transportation. The outstanding respects in which the carrier plans have been found to be defective are the following: (1) Due principally to requirements of continuity of service, the carrier systems have largely failed to provide employees with old-age security. Under them, few employees become eligible for pensions. (2) The amounts of pensions paid under the carrier plans have not been adequate. Twenty-five percent of the pensions in force on December 31, 1933, called for the payment of less than $30 per month. (3) Due to their continuity of service requirements, the existing pension plans operate to discriminate against the lower-paid classes of employees, among whom labor turnover is greatest, with respect to the probability of securing annuities. (4) The present plans, for similar reasons, also discriminate

against the lower-paid classes, with respect to the amount of annuity received upon retirement. (5) Under existing railroad pension plans, no enforceable rights are conferred upon the employees. Employees thus have no assurance that, even if they ultimately satisfy the eligibility requirements, they will be retired on pension, or that, if retired on pension, their annuities will not be discontinued or diminished. The number of retirements on pension has in fact diminished from year to year during the past several years, and reductions have been made in the amount of annuities paid to pensioners. (6) The carriers have failed to maintain reserve funds to insure their ability to pay pension costs; their practice is to charge pension payments against operating expenses each year as the payments are made. (7) Finally and of first importance, the existing carrier plans have failed to eliminate the great amount of superannuation which exists in railroad personnel.

(B) *Effect of the Railroad Retirement Act.*— By way of contrast with the voluntary railroad pension systems, the system established by the Retirement Act provides assurance to the employees of old age security. The elimination in the Retirement Act of the requirement of continuity of service removes the basic reason why few pensions may be earned under the existing systems. It also removes the factor which has tended to bring about the discrimination in favor of higher paid

classes as against the lower paid classes of employees with respect to both (1) the likelihood of obtaining any pension, and (2) the amount of annuity received. Also the amounts of annuities received under the Retirement Act are likely to be greater than those under the existing pension systems. The fixing of the normal retirement age under the Act at 65, as compared with 70 under the existing carrier pension systems, will do much to remove the superannuation now existing in the industry. On the whole, the Retirement Act embodies the principles which are generally regarded as being essential to a sound retirement and pension plan; it may be expected to promote economy and improve employee morale, and promote the efficiency and safety of interstate transportation.

If there is a substantial basis for the judgment of Congress with respect to the need for, and the likely effect of, the Act (as there is in this case), its action will not be held to be arbitrary. *Radice* v. *New York*, 264 U. S. 292, 294–295. That the benefits which respondents expected to derive from their voluntary pension plans (said to be (1) greater continuity of service, and (2) improved employee loyalty) differ from those emphasized in the Retirement Act does not affect the Act's validity, so long as it is calculated in other ways to promote efficiency and safety. The Retirement Act is based upon a fundamentally different conception from that which appears to underlie the carriers' volun-

tary pension plans. Whereas, the carriers seem to have regarded the pension as a gratuity in the nature of a reward for long, unbroken service, the Retirement Act emphasizes the systematic removal of superannuated workers and the improvement of employee morale and efficiency through providing definite assurance of old age security, and opening of paths to promotion and advancement. This is in accord with the current viewpoint regarding the most desirable objectives of pension plans.

## III

### THE PURPOSE OF THE ACT AS STATED THEREIN

It is clear from the mere examination of the Retirement Act that it was not adopted by Congress as a pretext for the accomplishment of unauthorized purposes. *Hammer* v. *Dagenhart*, 247 U. S. 251, and *Bailey* v. *Drexel Furniture Company*, 259 U. S. 20, have no application. The Act sets up a retirement and pension system which will be sound and adequate, and which Congress reasonably believed will lead to increased efficiency and safety in interstate transportation. The purposes indicated in the Act of providing for the satisfactory retirement of aged employees and of making possible more rapid advancement of employees; and the reference in Section 2 (a) to the "payment of annuities for relief of superannuated employees", are "not ends in and of themselves but means to the legitimate end of" promoting efficiency and safety in

interstate transportation. Compare, *Stephenson* v. *Binford*, 287 U. S. 251, 272. The relief of unemployment is not one of the chief aims of the Act. Compare *Arizona* v. *California*, 283 U. S. 423; *Smith* v. *Kansas City Title Company*, 255 U. S. 180. The reference to unemployment relief, in Section 2 (a) is but the expression of the hope that through the Act some such relief may incidentally be provided. *Ann Arbor Railroad Co.* v. *United States*, 281 U. S. 658, 668-669.

## IV

### POWER OF CONGRESS

Congress is authorized to enact a compulsory retirement and pension law applicable to interstate carriers in the interest of promoting efficiency and safety in interstate transportation, of improving labor conditions and relations, and of "fostering" and "protecting" the national transportation system. This is clear from the decisions of this Court defining the scope of the commerce power of Congress. Also, a brief survey of the "minutely detailed supervision, including that of their relations to their employees, to which the railroads of the country have been gradually subjected by Congress through its power over interstate commerce" (*Wolff Packing Company* v. *Court of Industrial Relations*, 262 U. S. 522, 543), demonstrates how clearly the Retirement Act falls within the scope of the commerce power. Numerous cases decided since the enactment of Transportation Act,

1920, disclose that concern for the preservation, promotion, and protection of the national transportation system has required the extension of Federal "guardianship and control" beyond matters of interstate rates alone, to matters which previously might have been left unregulated or subject to State regulation. *Illinois Commerce Commission* v. *United States*, 292 U. S. 474; *United States* v. *Louisiana*, 290 U. S. 70, 75; *Wisconsin R. R. Commission* v. *Chicago, Burlington & Quincy R. R.*, 257 U. S. 563; *New England Divisions Case*, 261 U. S. 184, 190; *Dayton-Goose Creek Ry. Co.* v. *United States*, 263 U. S. 456, 478; *Transit Commission* v. *United States*, 284 U. S. 360; *Colorado* v. *United States*, 271 U. S. 153; *Texas & New Orleans R. R. Co.* v. *Northside Belt Ry. Co.*, 276 U. S. 475, 479; *Texas & Pacific Ry. Co.* v. *Gulf, Colorado and Santa Fe*, 270 U. S. 266, 277; *Alabama & Vicksburg Ry. Co.* v. *Jackson and Eastern Ry. Co.*, 271 U. S. 244; *Chicago Junction Case*, 264 U. S. 258; *Texas* v. *United States*, 292 U. S. 522. The broad scope of the authority of Congress in the field of labor conditions and relations is evidenced by the numerous enactments of Congress in this field, which have met with the approval of this Court. *Southern Railway Co.* v. *United States*, 222 U. S. 20; *Texas and Pacific Ry. Co.* v. *Rigsby*, 241 U. S. 33 (safety appliance acts); *Baltimore & Ohio R. R. Co.* v. *Interstate Commerce Commission*, 221 U. S. 612 (hours of service); *Wilson* v. *New*, 243 U. S. 332 (wages during emergency); *Texas & New Or-*

*leans R. R. Co.* v. *Brotherhood of Railway & Steamship Clerks*, 281 U. S. 548 (labor relations).

The Emergency Railroad Transportation Act of 1933, which this Court said confirms and carries forward the Transportation Act, 1920 (*Texas* v. *United States*, 292 U. S. 522, 530; *Florida* v. *United States*, 292 U. S. 1, 8), directs the Federal Coordinator of Transportation (Section 13) to investigate and consider means "of improving transportation systems throughout the country * * * including, also, the stability of railroad labor employment and other improvement of railroad labor conditions and relations." This shows beyond question the existence in the mind of Congress of a need for improvement in railroad labor conditions and relations. Approximately 60 percent of all operating expenses of interstate carriers are expended as direct labor costs. The power of Congress is not limited to the improvement of the physical facilities of the carriers, but Congress may deal also with the employees, who compose an important element of the national transportation system. *Baltimore & Ohio Railroad Co.* v. *Interstate Commerce Commission*, 221 U. S. 612, 618–619.

## V

### APPLICATION TO ALL EMPLOYEES OF INTERSTATE CARRIERS

The Court below found that 211,107, or nearly one-fifth of all respondents' employees, earning annually not less than $300,000,000, were not engaged

in interstate commerce or transportation. It held, relying upon *The Employers' Liability Cases*, 207 U. S. 463, that the inclusion of these employees under the Act rendered it wholly unconstitutional.

The lower court's classification of employees not engaged in interstate commerce or transportation, based presumably upon decisions under the Federal Employers' Liability Act, may be disregarded, since this Court has said that that Act does not mark the limits of the power of Congress under the Commerce Clause, *Illinois Central R. R. Company* v. *Behrens*, 233 U. S. 473, 477. No showing is made that the 211,107 employees referred to are not engaged in the transportation business of respondents or that their efficiency does not affect the efficiency of the national transportation system.

However, *The Employers' Liability Cases* do not hold that Congress lacks power to enact legislation applying to employees not directly engaged in interstate commerce. This is apparent from the numerous subsequent decisions of this Court sustaining legislation applicable to employees engaged in interstate commerce and to employees generally. *Southern Railway Co.* v. *United States*, 222 U. S. 20; *Texas & Pacific Railway* v. *Rigsby*, 241 U. S. 33; *Baltimore & Ohio R. R. Co.* v. *Interstate Commerce Commission*, 221 U. S. 612; *Texas & New Orleans R. R. Co.* v. *Brotherhood of Railway & Steamship Clerks*, 281 U. S. 548. The latter case involved the validity of the Railway Labor Act, which applied, as does the Retirement Act, to railway employees generally.

The question must be decided on the basis of the facts in each case, by reference to the purposes sought to be accomplished by the legislation in question and by determination whether the inclusion of the employees in question is reasonably necessary in order to effect these purposes. *Minnesota Rate Cases*, 230 U. S. 352, 399; *Stafford* v. *Wallace*, 258 U. S. 495, 515–516; *Chicago Board of Trade* v. *Olsen*, 262 U. S. 1; *Tagg Bros. & Moorhead* v. *United States*, 280 U. S. 420. Similar principles have been applied to sustain the validity of the various provisions of the Transportation Act, 1920, and related subsequent legislation wherein Congress has acted in the interest of assuring to this country an adequate national system of transportation. *Transit Commission* v. *United States*, 284 U. S. 360, *supra*; *Colorado* v. *United States*, 271 U. S. 153; *Texas & New Orleans Railroad Co.* v. *Northside Belt Railway Co.*, 276 U. S. 475, 479, *supra*; *Pittsburgh & W. Va. Railway Co.* v. *Interstate Commerce Commission*, 293 Fed. 1001; *Wisconsin Railroad Commission* v. *Chicago, Burlington & Quincy R. R. Co.*, 257 U. S. 563, *supra*; *Dayton-Goose Creek Ry. Co.* v. *United States*, 263 U. S. 456, *supra*; *Transit Commission* v. *United States*, 289 U. S. 121; *Texas* v. *United States*, 292 U. S. 522. It seems inconsistent that Federal supervision of abandonments of intrastate lines of interstate carriers (involving comparatively insubstantial burdens upon interstate commerce, *Transit*

*Commission* v. *United States,* 284 U. S. 360) is necessary to insure the efficient operation of the industry, but that supervision of one-fifth of the entire personnel (receiving as annual compensation not less than $300,000,000) is not equally necessary for the same purpose. The fact that legislation commencing with Title III of the Transportation Act, 1920, regulating railroad labor relations has applied to interstate carrier employees generally, and has nevertheless been sustained by this Court, indicates that Congress lawfully included all employees under the Retirement Act. *Pennsylvania Railroad Co.* v. *United States Railroad Labor Board,* 261 U. S. 72; *Texas & New Orleans R. R. Co.* v. *Brotherhood of Railway & Steamship Clerks,* 281 U. S. 548. Furthermore, there are practical considerations, arising principally from the fact that employees shift from time to time between tasks in interstate and intrastate commerce, and that the two are often indistinguishable, which should lead the Court to refuse to hold that the Act may apply only to employees whose work is directly in interstate commerce. *Long Island R. R. Co.* v. *Department of Labor of the State of New York,* 256 N. Y. 498.

## VI

### MEASUREMENT OF ANNUITIES

The ruling of the lower court—that the requirement of the Act with respect to the payment of annuities on the basis of years of service, including

years of service rendered prior to the Act, requires respondents to "contribute huge sums of money to be devoted to the payment of pensions or annuities based upon service long since completed and fully paid for" and, therefore, takes their property without due process of law—indicates that the court failed to take account of the purpose of the annuity payments and misapprehended the role of prior service in determining the amounts of annuity payments. The pension is not an additional payment for past services but is an expenditure for a present and future benefit through improvement of the personnel of the carriers.

If Congress is authorized, in the interest of improving the national transportation system, to provide for the compulsory retirement and pensioning of superannuated workers, clearly the manner in which the amount of annuities shall be determined rests in its sound discretion. Measurement of annuities according to years of service is eminently fair to the carriers. The fact that the Act draws upon past facts, i. e., years of service prior to the Act, for the calculation of annuities does not render the statute retroactive. *Cox* v. *Hart*, 260 U. S. 427, 435; *Hawker* v. *New York*, 170 U. S. 189. The payment of pensions under State pension laws has been several times sustained, although the service periods of the pensioners in part antedated the laws, in the face of express constitutional prohibitions against the payment of additional compensation for services previously rendered and paid for.

The fact that persons previously in the employ of the carriers who are reemployed subsequent to the passage of the Act will receive credit toward their pensions for services rendered in the past is, in the light of the pertinent circumstances, not unreasonable. Nor is it unreasonable to provide for the payment of pensions to persons who are required to retire forthwith, and who will not contribute any substantial sums toward the costs of their annuities.

## VII

### INCLUSION OF PERSONS IN THE SERVICE WITHIN A YEAR PRIOR TO THE ACT

The court below held unconstitutional the provision which includes as employees under the Act persons who were in the service of the carriers within one year before the adoption of the Act. The considerations which led Congress to include these employees appear in the legislative history of the Act. It is the practice of the railroad industry to grant employees who have been furloughed so-called "prior reemployment rights", i. e., the last employee removed from the pay roll is the first to be recalled to service when a vacancy occurs; and the names of these employees are kept on seniority lists. In addition, in order to fill unexpected vacancies, a number of employees are kept upon "extra" or "call" lists and are subject to call at all times and hold themselves in readiness for railroad service in preference to securing

other employment. Both groups are commonly regarded, and regard themselves, as railroad employees, and they were included as employees in the early drafts of the Act. Because the period of time during which the names of employees are listed as retaining their seniority rights or are continued on the call lists varies with the different carriers, and for reasons of fairness, it was decided to include within the Act all employees who had been in the service during the year preceding passage of the Act, the one year period being taken as a reasonable approximation of the usual duration of employment rights. Under the circumstances, the inclusion of the employees in question was not unreasonable.

## VIII

### OTHER CONTENTIONS OF RESPONDENTS

None of the other provisions of the Act attacked by respondents is unreasonable or otherwise unlawful.

1. *Payment of annuities to persons who have left the service prior to the retirement age.*—The Act provides that annuities shall be payable to employees at age 65 even though they do not continue in the service until that age, the amounts of annuities being determined, of course, by length of actual service. In the absence of such provision, employees who were laid off or discharged, even though this occurred on the very eve of retirement,

would lose their pension rights. The purpose of the provision in question is to provide assurance of old-age security. Such provision is reasonable, not because of its effect upon employees after they have left the service but because it improves the morale of employees while they are in service.

2. *Optional retirement after 30 years' service.*—Under the Act any employee after a service period of 30 years is entitled to retire before age 65 with reduced annuity. The justification for this provision is that employees who have completed 30 years of service may find it necessary, and it may be in the interest of the industry, for them to retire before age 65. The reduced amount of annuity in the case of retirement before age 65 may be expected to discourage such retirements unless they are reasonably necessary.

3. *Inclusion of employee representatives.*—Under the Act official representatives of employee organizations who have previously been in the service of a carrier are given the option of becoming, or continuing to be, beneficiaries under the provisions of the Act, provided that they pay both employee and carrier contributions. The inclusion of employee representatives does not burden the retirement fund. In any case, the inclusion of employee representatives is reasonably necessary if the policies of the Railway Labor Act are not to be defeated; railway employees might be loath to surrender their rights under the Retirement Act in order to become employee representatives.

4. *"Pooling" of "funds and affairs".*—Because the Act provides for the payment of all contributions into a common fund; and because the amounts of annuities are made to depend on the service periods of the employees, time spent in the service of any carrier being made part of an employee's service period, respondents contend that there is an improper "mingling" and "pooling" of their "affairs and funds" and the service periods of their employees. There can be no objection to the mere establishment of a common fund from which annuities are to be paid. Respondents' objection is, rather, that the Act prescribes an improper measure for determining carrier contributions to the fund.

The adoption of an industry-wide retirement and pension system is justifiable in the interest of improving the national transportation system. The efficiency of each part of the system is necessary to the efficiency of the system as a whole. *Colorado* v. *United States,* 271 U. S. 153, 164. Since the railroads, as well as the public, have a common interest in the efficient performance of the transportation system as a whole, it cannot matter that superannuated employees are unevenly distributed among them at the present time, or that the age classifications or average service periods of employees may differ with different carriers. The fact is, moreover, that there is strong evidence of the absence of any substantial differences between the age clas-

sifications and average service periods of the employees of the different carriers, so that in the long run it is not unlikely that costs under the Retirement Act will be distributed among the carriers very nearly in proportion to the annuities paid to their respective employees.

The legality of the pooling principle when reasonably applied is well settled. *Mountain Timber Company* v. *Washington*, 243 U. S. 219; *Thornton* v. *Duffy*, 254 U. S. 361; *Noble State Bank* v. *Haskell*, 219 U. S. 104; *New England Divisions Case*, 261 U. S. 184; *Dayton-Goose Creek Railway Company* v. *United States*, 263 U. S. 456; *Atlantic Coast Line Railroad Company* v. *Riverside Mills*, 219 U. S. 186.

## IX

### CARRIERS' LIBERTY OF CONTRACT

The Retirement Act does not interfere with the right of the carriers to contract with their employees with reference to wages. *Adkins* v. *Children's Hospital*, 261 U. S. 525, is not applicable. The Retirement Act does not, either directly or indirectly, fix the amount of wages to be paid by respondents.

## X

### PRESENT FINANCIAL CONDITION OF CARRIERS

Enactment of the Retirement Act at this time is not unreasonable by reason of the present financial condition of the carriers. No case has been found in which a regulation (other than rate regulation),

otherwise valid, was held invalid because of the complaint that the plaintiff could not bear the cost. In any event, respondents' reliance upon conditions during the depression years is misleading. It cannot matter whether the earnings of the carriers during the past 2 or 3 years have been low, unless it is to be assumed that the years in question are typical of those during which the Act will apply. It is common knowledge that with improvement in economic conditions net revenues of the railroads tend to improve rapidly, due to the fact that great quantities of additional traffic can be handled with comparatively little increase of facilities. There is no reason to believe, therefore, that the carriers will not be able in normal years to pay the costs of the Retirement Act. It may not be assumed, either, that the contributions of the carriers to the retirement fund, even at the outset, represent the net cost of the Act to the carriers. Actual savings in pay rolls will undoubtedly result from the Act, in addition to the intangible benefits that will accrue to the carriers. Furthermore, the Retirement Act must be considered in connection with the Emergency Transportation Act of 1933, and in connection with the entire Congressional program for the rehabilitation of the railroads.

ARGUMENT

In the view of the Government the Railroad Retirement Act is intended, and is reasonably calcu-

lated, to promote efficiency and safety, to improve labor conditions and relations, and to foster and protect the national transportation system. In the court below, respondents took the position that the Act is neither intended nor calculated to accomplish these objectives. The true purposes of the Act, they contended, were to provide relief against unemployment and to confer gratuities upon the employees of the carriers. The court below was not persuaded by these contentions of respondents, as indicated in its opinion (R. 262–263). However, since respondents have expressed an intention to renew these contentions in this court, and because a consideration of the meaning and purpose of the Act as a whole will be helpful toward a proper understanding of the other questions in the case, the purposes of the Act will be discussed prior to consideration of the questions presented in the petition for certiorari.

As will appear, the Railroad Retirement Act, although it embodies the first compulsory retirement and pension plan enacted in this country, is but the development of voluntary plans which have been in use in this country, particularly among the railroads, for more than a third of a century. It is essential to a proper understanding of the Retirement Act to consider the development of pension systems and to know what they have accomplished and were intended to accomplish. The first

section of this brief will, therefore, be devoted to showing that industrial pensions, prior to the Retirement Act, were coming into increasingly widespread use and that they were being adopted by employers primarily for the purpose of promoting efficiency and economy through the humane and systematic removal of superannuated employees and the substitution of young and efficient workers, with consequent improvement of the morale of the entire personnel.

The second section will point out inadequacies of present railway pension plans, and will show the need for a sound system calculated to promote efficiency, economy, and safety in interstate transportation, and that the Retirement Act is calculated to accomplish these purposes. The third section will treat briefly the contentions of respondents with respect to the statement of purposes contained in Section 2 (a) of the Act. The fourth section will show, by reference to the pertinent authorities, that it is within the power of Congress to enact a compulsory retirement and pension plan applicable to interstate carriers. The bearing of *The Employers' Liability Cases* on the application of the Act to *all* employees of the carriers will be considered separately. The remaining questions presented in the petition for certiorari and other contentions raised in the bill of complaint will be treated in subsequent sections of the brief.

# I

## THE PRINCIPAL PURPOSE OF SOUND INDUSTRIAL RETIREMENT AND PENSION PLANS IN GENERAL IS TO PROMOTE EFFICIENCY AND ECONOMY

### A. Summary of the Development of Industrial Pension Plans

The Retirement Act is the developed product of many years of experience with industrial pension plans. It does not introduce a retirement and pension system into the railroad industry, but is a development of the voluntary systems already in effect in the industry.

It is significant that in almost all countries railroads have been the first to provide old-age pensions for their employees (R. 169). This has undoubtedly been due, first, to the fact that railroading was among the first of the industries in which individual units attained great size, and, second, to the fact that, railroading being one of the oldest industries, there has been a tendency toward an increased age level of its employees (*Ibid.*). The first voluntary pension systems on railways appeared in European countries around the middle of the last century: Belgium, 1845; Netherlands, 1845; Great Britain, 1853; France, 1856; Russia, 1858; Denmark, 1859; Italy, 1862; Sweden, 1868; Portugal, 1877; Norway, 1890 (R. 170). By 1890 pension systems for railway employees covered substantially all Europe (*Ibid.*). In Canada the first

railway pension plan was established in 1874 and in the United States in 1884 (*Ibid.*).

In this country, progress at the outset was slow, but by 1910 railroads employing approximately fifty percent of all railway employees had formal pension plans (*Ibid.*). This percentage increased to 82.4 in 1927 and remained substantially the same until the enactment of the Retirement Act (*Ibid.*).

Other industries followed quickly in the footsteps of the railroads and pension systems came to be adopted in the United States by public utilities, banks and insurance companies, and large corporations in the manufacturing industries. Latimer, *Industrial Pension Systems,* Vol. I, pp. 35–43; Vol. II, pp. 842–843.* In 1932, some 430 companies, employing normally about four million persons, had pension systems in operation (*Ibid.,* Vol. II, p. 893). Approximately 140,000 persons were receiv-

* In this and other parts of the brief, citations are made to material not included in the record. Such material, in addition to House and Senate Reports and hearings before Senate and House committees, consists of texts and other reliable sources of information pertaining to retirement and pension systems. Some of the latter sources were referred to in the House and Senate Committee hearings. Petitioners believe that the material referred to in this brief may properly be considered by the Court, in considering the constitutional questions presented. See *Muller* v. *Oregon*, 208 U. S. 412, 419; *Bandini Co.* v. *Superior Court*, 284 U. S. 8, 16; *Home Building & Loan Association* v. *Blaisdell*, 290 U. S. 398, 422, 444; *Chicago Board of Trade* v. *Olsen*, 262 U. S. 1, 10–15; *Nebbia* v. *New York*, 291 U. S. 502; *Burns Baking Company* v. *Bryan*, 264 U. S. 504, 514, 519; *Schollenberger* v. *Pennsylvania*, 171 U. S. 1, 9–10.

ing pensions to the amount of $100,000,000 annually (*Ibid.*).[9]

The increasing extent to which pension plans have been voluntarily adopted would seem to indicate clearly that employers regard it as good business policy to retire and pension their superannuated employees systematically. Further analysis will show that the dominant motives underlying the adoption of pension plans have come to be those of efficiency and economy.

**B. Motives Underlying Adoption of Voluntary Pension Plans**

The essence of an industrial retirement and pension system is, of course, the retirement from industry of employees who have reached a stated age, and the payment to them of allowances for their support thereafter until death. In its latter aspect it has much in common with plans for the relief of old age dependency. However, neither in origin nor in its present development is the industrial pension merely an old age relief measure. On the contrary, "industrial pension systems make no pretense of being aimed at general relief of old age dependency." Latimer, *op. cit.*, Vol. I, p. 4. It is noteworthy that workers have taken no part in

[9] During the time when the railroads of this country were adopting their voluntary pension plans, compulsory railroad pension plans were being enacted into law in foreign countries: France, 1909; Argentine, 1919; Brazil, 1923. Bulletin of U. S. Labor Statistics No. 561 (1932), *Public Old Age Pensions and Insurance in the United States and Foreign Countries*, pp. 99, 143, 155, 162, 193.

securing the adoption of industrial pension plans. "In the United States, organized labor has been apathetic and in some part even hostile to the adoption of voluntary pension systems" (R. 171). The fact is that the industrial pension was adopted by employers themselves as a business solution of an industrial problem.

The problem which the industrial pension plan is designed to solve is plain. Industry imposes rigorous demands upon the physical and nervous powers of workers. These powers are also subject to the inevitable impairment of age. Retention in service of superannuated workers whose powers have become impaired, just as the retention in service of worn or obsolete equipment, is detrimental to efficiency. Not only does the employee's own output suffer by reason of old age, but in a highly organized industry the declining activity of particular employees causes a general slowing down, a lag in the work of the entire force. The retention of the older workers, moreover, blocks the path to advancement of younger workers, and results in discontent and impairment of their morale. Obviously, also, the safety, not only of the older employees themselves, but also of others affected by their conduct, may be endangered with consequent cost to the industry.

Humane reasons alone prevent the discharge of superannuated workers without provision for their support. Deterrents also are the dangers, injurious to business, of incurring public resentment, as

well as resentment of the remainder of the staff. In the absence of some form of pension, such employees are retained at the expense of efficiency. Sometimes they are shifted to sinecure jobs created for them; sometimes they are kept on the payroll but relieved of their duties.[10] Such a policy, i. e., treatment of the problem on an individual basis, must necessarily be a burden upon executives charged with its execution. The necessities of this situation are largely responsible for the adoption of industrial pension plans.

It is true that the dominant reasons which have led to the use of pensions have not been the same with all employers and at all times. Some employers saw in the industrial pension plan a device for avoiding labor disputes and strikes. This is said by two railway officials whose affidavits were filed by respondents in this case to have been among the reasons motivating the adoption of pensions

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[10] A special committee of the United States Chamber of Commerce reported:

"The employer who is considering the adoption of an annuity plan * * * should balance the cost of annuities against the benefits which he expects to derive and against the cost of alternative measures, of which the most common is the retention of superannuated employees beyond the ages at which their services are profitable.

"Theoretically, there is another expedient; the discharge of old employees without any provision for their support. Few corporations or other employers find it desirable to resort to this method. Unfavorable reactions from the public and from employees are likely to more than offset any savings thereby effected. *Employees' Retirement Annuities*, U. S. Chamber of Commerce, 1932, p. 5.

on some roads (R. 236, 256). Other employers hoped that the adoption of industrial pension plans would instill in their employees a feeling of loyalty and would encourage greater continuity of service, thus reducing labor turn-over. A number of executives of respondents have stated in affidavits filed in this case that the promotion of loyalty and continuity of service were the sole objectives which motivated them in the adoption of their pension plans. (See *infra*, pp. 73–74.) It is clear, however, that in recent years the emphasis has been, to an increasing extent, upon the elimination of waste and upon the promotion of efficiency and economy through the systematic elimination of workers who have become too old to work efficiently.

These observations are borne out by highly authoritative sources. Mr. Latimer, who has conducted the most comprehensive study that has been made of industrial pension plans (*Industrial Pension Systems*, 1931) and who today is probably the outstanding authority in this field (R. 162–163), traces the trend of reasons for the adoption of industrial pensions in this country as follows (R. 170):

> Employers thought the payment of pensions to be good business management because it would bring public approval and more business. They hoped that the payment of pensions would improve the morale of their employees and bring increased

loyalty to the employer. This improved morale and increased loyalty would, in turn, it was thought, prevent strikes and other labor disturbances. With the increasing recognition of the costs involved in the retention in service of superannuated employees, attention was directed to more tangible advantages. It was recognized that superannuated employees not only lost in their own efficiency but placed a drag upon the entire organization of which they were interdependent units and blocked promotions, with consequent improvements, all along the line of the organization. *Automatic retirement of superannuated employees under pension systems was expected to improve efficiency, remove the drag, and open up opportunities for promotion, leading, in turn, to increased efficiency and improved employee morale.* (Italics supplied.)"

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[11] See also: "In addition to hurting corporate good will, impairing friendly relations with workers, and shaking the confidence of labor in the good faith of capital, the failure of the pension idea would also deprive corporate management of an important administrative device for freeing their pay rolls of the ruinously expensive burden of aged and under-efficient employees. Experience has shown conclusively that the presence of such employees in active personnel only serves to slow down the whole industrial machine and raise production costs. A fundamental and purely practical consideration of established pension plans was that it would be cheaper to pension aged employees than to keep them at work." Edwards, *Industrial Pension Plans Collapsing*, 1925, The Annalist, Vol. 26, p. 637.

Prominent organizations representative of large business interests have unqualifiedly urged the adoption of pension plans in order to promote economy and efficiency, and as being in the interest of industry as well as the public generally. In a resolution adopted at the 20th annual meeting of the Chamber of Commerce of the United States in 1932 it was stated (*Employees' Retirement Annuities,* Chamber of Commerce of the United States, 1932):

> Retirement for superannuated employees of long service on annuities is an aid to the profitable administration of business enterprises. The advantages to employers, to employees, and to the public are obvious.

In the accompanying special committee report upon which this resolution was based, the following recommendations, among others, were made to the members of the Chamber (pp. 7–8):

> 1. Regard for the personal interests of their employees, for the welfare of society in general, and *for efficient administration of their own enterprises* should prompt employers to develop some method for aiding in providing for the financial security of their superannuated employees.
>
> 2. The retirement of superannuated employees of long service on annuities *is an aid to the profitable and efficient administration of business enterprises* and is advantageous to employers, to employees and to the public. * * * (Italics supplied.)

In a study entitled, *Elements of Industrial Pension Plans,* published in 1931, the National Industrial Conference Board, Inc., closely associated with business organizations, presents an intensive analysis of the trend of employer thought with respect to pension plans.[12] After pointing out (p. 6) that in the beginning the humanitarian motive for the adoption of industrial pension plans was dominant, the Conference Board states (p. 8) that eventually the conception of industrial pensions as dictated and justified by economic expediency took definite shape in the minds of employers. "It came to be recognized", the Board states (p. 8), "that the fundamental raison d'etre of the pension system is to be found in the concrete fact that it increases efficiency and lowers costs." Expanding upon this statement, the Board continues (p. 8):

> Realization of the economic benefits of the pension plan could not, of course, come about until practical experience had demonstrated those advantages. As the economic effects of old-age pensions gradually

[12] The following statement appears in the preface to the study (p. VII): "In the preparation of its studies, the National Industrial Conference Board avails itself of the experience and judgment of the business executives who compose its membership, and of recognized authorities in special fields, in addition to the scientific knowledge and equipment of its Research Staff. The publications of the Conference Board thus finally represent the result of scientific investigation and broad business experience, and the conclusions expressed therein are those of the Conference Board as a body."

> revealed themselves, employers began to perceive that a well-ordered retirement plan may be a paying business proposition. The savings under such a plan, through elimination of waste, and the gains from stimulus to efficiency, were found to be sufficient in most cases to cover the necessary outlay. The pension plan won wide recognition as a practical economic solution of the problem of industrial superannuation.[13]

The Conference Board points out (p. 8) that employee obsolescence has become accelerated by reason of the quickening pace of modern machine industry, bringing about the necessity of retirement of workers at an earlier average age. Stating that these conditions make increasingly urgent the

[13] Analyzing the economic advantages of pension plans, the Board states in part (p. 10): "In addition to the immediate savings through elimination of waste, the pension plan brings further gain through stimulation of efficiency: (1) by quickening the pace of the younger workers now relieved of the drag of older employees with impaired working capacity; (2) by opening the way to promotion all along the line, especially at the start of the pension plan; and (3) by improving in various ways the plant morale. More specifically, the efficiency of the individual workers is stimulated by the feeling of security and hopefulness that results when the individual is relieved of the fear of destitution and dependency in old age and by the sentiment of loyalty and good will fostered by the pension plan, which thus operates as a spur to the ambition of the worker and incites him to more intensive and sustained effort. Similarly, the efficiency of the organization as a whole is increased by the improvement of industrial relations, the development of a cooperative spirit, and the promotion of constancy and continuity of employment."

problem of industrial superannuation, the Board adds (p. 8):

> Also the growing intensity of competition, necessitating closer attention to economies in plant organization and personnel administration, leads thoughtful employers to consider the adoption of a pension plan as a measure of economy.

These findings of representative groups of large business interests, based upon experience and careful study, would seem to indicate that the industrial pension plan may reasonably be considered as, essentially a device for the improvement of personnel, for the elimination of waste, and the promotion of efficiency, in the interest of industry and of the public.

*Government retirement plans.*—National, State, and local governments have recognized, with respect to the public service, the need for, and beneficial effects of, retirement and pension systems in the interest of promoting efficiency and economy. (See Comments, 44 Yale Law Journal 292, 296; and see also U. S. Department of Labor, *Public Service Retirement Systems,* Bureau of Labor Statistics, Bulletin No. 477, 1929.) For example, the most extensive governmental pension system, that applying to the Federal civil service, was aimed specifically at the elimination of waste and inefficiency, resulting from the retention in service of superannuated workers. The facts are disclosed in a report of a Committee of the House

of Representatives upon a bill to amend the Federal Retirement Act (House Report, No. 768, 69th Cong., 1st Sess.). Under the civil-service system, tenure in Federal employment tended to become permanent, as a result of which an increasing number of employees grew old in the service and became inefficient. "As most of the superannuates had been unable to make provision for their old age, it was practically impossible to induce the responsible heads of departments, bureaus, and divisions to dismiss them. * * * As a result there sprang into existence an unofficial pension system, unwarranted in law, and wasteful and extravagant in practice. This system consisted simply of retaining on the payroll all employees of long years of service, who, by reason of advanced age and its attendant infirmities, were no longer efficient or competent. * * * Full salaries were paid for little or no work. * * * Competent employees on the same piece of work were retarded by the incompetent" (p. 9). The report adds (p. 9) that it was this situation which led Congress, in 1920, to enact the Civil Service Retirement Act.[14]

[14] President Taft, in transmitting to Congress a report of the Commission on Economy and Efficiency, on the subject of a Federal Retirement Act, introduced his message to Congress with the statement that: "It is unnecessary at this time to discuss at length the necessity for adopting some plan by which the service may be relieved of the loss from inefficiency of the personnel caused by the retention on the rolls * * * of those who have passed the age when they can perform a full day's work." The report of the Committee shows that

State courts have recognized that retirement and pension systems promote efficiency and economy.[15] The cases have involved generally the question

its recommendation of a Federal retirement system was based purely upon the promotion of efficiency and economy. (See: House Document No. 732, 62nd Cong., 2nd Sess.; see also: House Report No. 394, 68th Cong., 1st Sess.)

[15] *Cobbs* v. *Home Insurance Company*, 18 Ala. App. 206, 208, 91 So., 627, 629 (1921) cert. denied 207 Ala. 712, 91 So. 922 (1921), by retaining in the service men of the most faithful and efficient class; *Home Insurance Company* v. *Cobbs*, 20 Ala. App. 491, 494, 103 So. 165, 168 (1925), by raising the standard and promoting the efficiency of the department; *Hughes* v. *Traeger*, 264 Ill. 612, 618, 106 N. E. 431, 433 (1914), by encouraging competent employees to remain in the service and by retiring from service those who have become incapacitated from performing the duties as well as they might be performed by young or more vigorous men; *People ex rel. Kroner* v. *Abbott*, 274 Ill. 380, 385, 113 N. E. 696, 698 (1916), the same; *DeWolf* v. *Bowley*, 355 Ill. 530, 533, 189 N. E. 893, 894 (1934), the same; *Elliott* v. *Fire Commissioner of City of Boston*, 245 Mass. 330, 331, 139 N. E. 523, 524 (1923), by eliminating the superannuated; *Fellows* v. *Connolly*, 193 Mich. 499, 512, 160 N. W. 581, 586 (1916), by inducing continued and efficient service; *Bowler* v. *Nagel*, 228 Mich. 434, 440, 200 N. W. 258, 260 (1924), by inducing continued and efficient service, pensions are justified as an economic proposition; *State ex rel. Haig* v. *Hauge*, 37 N. D. 583, 591, 164 N. W. 289, 291 (1917), by encouraging continued and efficient service; *State ex rel. Retirement Board* v. *Kurtz*, 110 Ohio 332, 343, 144 N. E. 120, 124 (1924), by improving the morale and the standard of the force; *Commonwealth of Pennsylvania* v. *Walton*, 182 Penn. 373, 377, 38 Atl. 790, 791 (1897), by securing and retaining the services of the most faithful and efficient class of men; *State ex rel. Dudgeon* v. *Levitan*, 181 Wis. 326, 330, 193 N. W. 499, 501 (1923), by encouraging a more devoted, contented, and continuous service. And see *Heinz* v. *National Bank*, 237 Fed. 942, 953 (C. C. A. 8th, 1916).

whether State or local governments could validly pay pensions in view of constitutional prohibitions against gratuities or against the payment of additional compensation after service is completed; or they have involved the question whether payments of pensions by private corporations were justifiable expenditures, and quite uniformly the decisions have sustained the expenditures on the ground that they were proper outlays in the interest of economy and efficiency.

In view of this history, development, and practice, Congress was clearly justified in viewing pension plans as means of promoting efficiency and economy.

## II

### THE RAILROAD RETIREMENT ACT IS REASONABLY CALCULATED TO PROMOTE EFFICIENCY AND SAFETY, TO IMPROVE LABOR CONDITIONS AND RELATIONS, AND TO "FOSTER" AND "PROTECT" THE NATIONAL TRANSPORTATION SYSTEM

The proof would seem to be conclusive that industrial pension plans are now intended primarily to promote efficiency and economy. It is not to be assumed, however, that voluntary pension plans have generally been successful in the accomplishment of this purpose. The effectiveness of particular plans depends upon the character of the scheme adopted. Particularly, the railroad pension plans have proved to be inadequate. Railway employees have been long dissatisfied with the existing railway pension plans, the matter becoming

of such concern that they finally brought it to the attention of Congress (R. 196). Large numbers of employees, not content to act through the standard railway labor organizations, combined to form the Railroad Employees' National Pension Association (*Ibid.*). Such intense employee dissatisfaction would, alone, seem indicative of the fact that the existing pension systems were defective. As will presently be shown, investigation under the supervision of the Federal Coordinator of Transportation has confirmed that the growing discontent with the present pension systems was justified.

The Railroad Retirement Act is calculated, as will be shown, to remove the great amount of superannuation now existing in the industry and to overcome the inadequacies of existing railway pension plans which have prevented those plans from accomplishing the objectives of sound retirement systems. A significant feature of the Retirement Act is, of course, its compulsory character. The absence of any enforceable rights in the employees, under the existing plans, is an outstanding weakness since the carriers are not bound to continue to make retirements and the employees have no definite assurance that they will ever be retired on pension, or, if pensioned, that their pensions will continue. The present railway pension plans are defective in numerous other respects. The facts are fully set out in the affidavits filed by petitioners, particularly the affidavits of Mr. Joseph B. Eastman, Fed-

eral Coordinator of Transportation, and members of his staff who have been conducting a study of conditions as they existed prior to the Railroad Retirement Act.[16]

Commenting upon the existing carrier pension plans, Mr. Eastman states (R. 155):

> The experience with the voluntary pension systems has been unsatisfactory. The systems were established gradually, each carrier tending to copy plans already in effect. No very penetrating thought was given to them. Some modifications were made in the light of experience and certain practices were changed, but all within the original framework. The depression brought clearly

[16] The study referred to is being conducted in pursuance of the Emergency Transportation Act of 1933, under Section 13 of which the Coordinator was directed to investigate and consider ways and means of "improving transportation conditions throughout the country * * * including, also, the stability of railroad labor employment and other improvement of railroad labor relations and conditions." The study has not yet been completed, but the Coordinator and his associates have arrived at some noteworthy conclusions which are set out in their affidavits.

Mr. Eastman recommended to the Congressional committees which were considering the legislation which culminated in the Retirement Act postponement of legislative action until all the data collected in the course of the study could be completely presented. At the same time he offered criticisms of the bills then pending, which resulted in the elimination of, or changes in, many of their provisions (R. 154). It may be noted that Mr. Eastman made his affidavit five months after his appearance before the Congressional committees, and after having the benefit of additional analysis and consideration of his data.

to light their many weaknesses and uncertainties.

In the light of this experience, a compulsory, automatic, and uniform retirement and pension system for the whole railroad industry is, in my opinion, desirable.

Mr. Otto S. Beyer, Chief of the Section of Labor Relations of the staff of the Coordinator, who has been actively concerned with railroad labor relations since 1919 and who has been in general charge of the study with respect to railroad labor relations being conducted by the Coordinator (R. 198), states (R. 199) his "definite conclusion that the systematic retirement of superannuated employees, substantially in keeping with the plan now provided by the Railroad Retirement Act, is indispensable to the safe and efficient conduct of the industry * * *."

Mr. Latimer, who has been the expert in charge of the study referred to (R. 173), states (R. 182):

> Experience has proved * * * that the gains expected from pension systems cannot be achieved simply through voluntary action. Because of the inadequacies and limitations in the voluntary systems established in the industry * * * the achievement of many of the gains expected has been hampered and in some instances defeated. For the achievement of the desired ends a compulsory system without the limitations of the voluntary plans seems to be essential.

Drawing upon his extensive experience with industrial pensions, and relying on the data collected under the direction of the Coordinator in connection with the study just referred to, Mr. Latimer sets out in some detail in his affidavit the inadequacies of the existing pension plans of the carriers on the basis of which he arrived at the conclusion just stated (R. 172–180). The outstanding respects in which the present carrier plans are said by him to be defective are as follows:

(1) *The carrier systems have largely failed to provide employees with old age security.*—The percentage of employees who may become eligible for pensions under them is not great. An analysis of a sample of 400,000 persons employed during 1925–1928 indicated that of the employees entering the service of the carriers only 17 percent would ultimately qualify for a pension (R. 173). Even this percentage, intentionally calculated on a conservative basis "exaggerates materially the actual number of persons who have entered the service of railways while existing plans have been in effect and who actually had or would receive a benefit under the railways' pension plans" (R. 173).

This is largely due to the fact that practically all of the carrier plans "authorize the payment of pensions only to employees who have been *continuously* in the employ of the particular carrier

for a certain period of years—fifteen, twenty, or thirty"; furthermore, the employee must continue in service up until the retirement date, and "provisions that persons who leave the service of the carrier thereby relinquish all claims to pension allowance are standard in the railroad pension plans, as is the provision that if such persons reenter the service subsequently they shall be considered for pension-record purposes as new employees." (R. 173–174.) Thus an employee who has spent thirty years or more in the railroad industry may be ineligible for any pension because he is separated from service before attaining retirement age; or if he continues in service to age seventy, he may yet not be qualified for any pension because he may have shifted employment and may have been in the service of his last employer less than the required number of years, or because his service period of thirty years with his last employer may have been broken by an unexcused absence.

(2) *The amounts of pensions paid under most carrier plans have not been adequate.*—Of the 50,126 pensions in force on December 31, 1933, of which record was obtained, 25 percent called for payment of less than $30 per month, the average being $54 per month; and only 2.6 percent of the payments to individuals exceeded $100 per month (R. 173), the latter apparently received in large part by retired officials (R. 176).

(3) *The present plans operate to discriminate against the lower paid classes of employees with respect to the probability of securing an annuity.*—Small as is the general probability of ultimate qualification for a pension, the probability varies greatly as between different classes of employees, again because of the requirement of continuity of service. Since, due to seasonal employment, for example, in the maintenance service, there is greater labor turnover among the lower paid employees, these (though obviously in greater need of pensions) have far less chance of benefiting from the voluntary pension systems than have the more highly paid classes of employees. On the basis of the data collected in the Coordinator's study, the probability in the train and engine service of ultimate qualification for a pension is approximately 30 percent, this being 50 percent greater than that for the clerical forces generally, twice as great as that for the agent, towerman and telegrapher group, and about 3½ times as great as for persons in the still lower paid maintenance service (R. 174–175).

(4) *The present plans also discriminate against the lower paid classes with respect to the amount of annuity received upon retirement.*—This is due to the fact that the annuity is ordinarily computed on the basis of 1 percent of the average pay during the last ten years of service, multiplied by the number of years of *continuous* service (R. 175).

Because of the greater rate of labor turnover among the lower paid classes, the number of years of *continuous* service is likely to be less than in the higher paid classes. Also, among the lower paid classes, the average pay during the last ten years of service is likely to be less than the average pay throughout the entire period of service, whereas the pay of the higher-paid classes is likely to increase during the years prior to retirement (R. 176).

(5) *Under existing railroad pension plans no enforceable rights whatsoever are conferred upon the employees.*—The carrier reserves the right to reduce annuities, discontinue them entirely, and amend or abolish the pension plan at any time (R. 177–178). The typical railroad pension plan reserves the right to the management, among other things, "to terminate the pension system or any pension or pensions previously allowed or to modify the pension system in any respect either generally or in its application to any specific case" (*Ibid.*).[17]

In this respect the carrier plans have lagged behind other industrial pension plans. By the end

[17] While the practice has not been extensive, the threat of loss of pensions has been used on occasion as a weapon against collective action by the employees; absence during a strike has been regarded as a break in continuity of service necessary to attain a pension; and persons already retired on pensions have been called back to work during strikes, on pain of loss of pensions (R. 200).

of 1932 almost 50 percent of the plans in other industries provided some form of legal guarantee to pensioners. They have tended to guarantee at least that, once the payment of annuities has been started, the employee will not be deprived of his pension and the amount will not be reduced (R. 178). The fact that employers in other industries have themselves recognized the necessity of providing some form of guarantee indicates the desirability of a compulsory and automatic plan such as that embodied in the Retirement Act.

The number of railway employee retirements on pension has, in fact, diminished from year to year during the last several years. In 1931, 7,417 employees were retired on annuity; in 1932 this number dropped to 7,330; and in 1933, to 5,694 (R. 179). The rate of retirements in 1934 was even lower than in 1933 (*Ibid.*). Some carriers have been making retirements as usual, but a considerable number have been making large reductions in the number of retirements, and at least one carrier has made no retirements since 1930 (*Ibid.*). In the face of an aggravated unemployment situation, as Mr. Beyer points out (R. 200–201), this policy has served only to intensify the dissatisfaction of railroad employees as a whole with the voluntary pension plans. He adds:

> The younger railroad employee, either unemployed or working part time, sees older men retained in the service who ordinarily

would be retired, while the older employee, who has reached retirement age and looked forward to the day when he would be retired, finds that he must continue in service and may, perhaps, never be pensioned at all.

Reductions have also been made in the amounts of annuities. Out of 47 railroad pension plans, 35 have reported reductions in the amounts of pensions payable to some or all pensioners (R. 179–180). The total annuities being paid to 50,216 pensioners as of the end of 1933 amounted to $2,692,662 a month, as compared with a total of $2,942,722 a month originally granted to the same employees, making an average reduction of 8 percent (R. 180). Furthermore, the variation in the amount of reduction as between the several carriers is great, ranging from as low as 1 percent in some cases to as high as 40 percent in others (*Ibid.*). Most railroads reduced pension payments by 10 percent or more (R. 196). When it is considered that the pensions originally granted were small, reductions such as these are substantial. Obviously, also, the amount of a particular reduction may not be as important as the fact that a reduction has been made, for it is thus demonstrated to the employees that they have no assurance of old age support. The threatened withdrawal of a promised pension may be affirmatively demoralizing. Mr. Eastman states (R. 155) that "withdrawal or extensive curtailment of existing pen-

sions in the railroad industry would impair the morale of railroad employees and play havoc with railroad labor relations."

In connection with these recent tendencies, it is no answer that the past several years have been depression years, and that the railroads have found it difficult to meet their pension costs, for the failure of the carriers to set aside funds during prosperous years in anticipation of future needs is another of the grounds on which the existing carrier pension plans are open to criticism.

(6) *The carriers have failed to establish and maintain retirement reserve funds.*—Despite the rapid increase of the amount of pensions payable from year to year and the demonstrated probability that this increase would continue for a long period of years, the railways have continued to charge pension payments against operating expenses each year as the payments are made (R. 177). With one or two exceptions, no serious effort was made by the carriers to secure the solvency of their pension systems (*Ibid.*). In this connection Mr. Latimer states (R. 177):

> This policy of the railroads has been in sharp contrast to the policies pursued by other large American corporations which have maintained voluntary pension plans similar in character to those maintained by the railroads. By one means or another in the period since 1920, funds in excess of $600,000,000 have been accumulated and the

> accumulation has proceeded even during the depression. A number of large companies made heavy charges against their surplus accounts in setting up more or less adequate reserves.

The failure of the carriers to adopt a reasonably adequate financial program, Mr. Latimer suggests, was an important contributing factor which led employees to view with decided skepticism the value of the pension offers made to them by their employers (R. 177).

Respondents may urge that the Railroad Retirement Act likewise fails to provide for any reserve against increased future costs. The sums authorized to be collected from employers and employees under the Act are "such as to provide from the combined employee and carrier contributions, with a reasonable margin for contingencies, an amount necessary to pay the annuities, other disbursements, and the expenses becoming payable from time to time" (Section 5). This is not to be taken, however, as indicating that Congress did not believe that the establishment of a reserve was desirable or necessary. On the contrary, it is apparent that the failure of the Act to provide for the immediate accumulation of reserve funds is due solely to the fact that Congress did not believe it wise to require the carriers to establish a reserve *at this time*. The sums authorized to be collected under the Act will suffice to pay the costs of the retirement system for several years to come (R. 137).

The Retirement Board is required by Section 2 (b) to report to the President not later than four years from the effective date of the Act "recommendations for changes in the system created by the Act, as shall assure the adequacy and permanency of said retirement system * * *". Furthermore, in reporting the bill the Senate Committee said (Senate Report No. 974, 73rd Cong., 2d Sess., p. 2):

> This plan contemplates the possibility of determining from the actual experience such fundamentals as are necessary to the construction of a sound reserve plan.

In any event, under a compulsory, industry-wide system as provided by the Retirement Act, the absence of provision for a reserve fund is not open to the same criticism as is the absence of such provision in the voluntary plans, since the compulsory and industry-wide character of the system may furnish sufficient assurance to employees.

(7) *Finally, and of first importance, is the failure of existing carrier pension plans to eliminate the great amount of superannuation which exists among railroad personnel.*—As previously stated, the fact that railroading is an old established industry has alone brought about much superannuation among its employees (R. 154). The testimony shows that this natural tendency is enhanced by the employment rules in force on the railroads, especially the system of seniority whereby the younger men in service are the first laid off and

the older men are the first recalled to service, and whereby the older men have rights when unemployed to dislodge the younger men (R. 34, 139, 154–155). Because of these facts, Mr. Eastman states that (R. 155):

> Superannuation among railroad employees is probably much in excess of that existing in industry generally.
>
> This excessive superannuation is detrimental to railroad service in several ways. Men who have grown old in the service decline in efficiency. The carrier pays in wages an amount out of proportion to the service rendered. These conditions exist upon the railroads at the present time. There is now a large body of superannuated employees in railroad service who, for the good of the service, ought to be retired.

Similar statements made by Mr. Eastman before committees of Congress went unchallenged by the carriers. (Hearings before Subcommittee of the Senate Committee on Interstate Commerce, 73rd Cong., 2d Sess., on S. 3231, p. 155; Hearings before the House Committee on Interstate and Foreign Commerce, 73rd Cong., 2d Sess., on H. R. 9596, p. 35.[18]) Similar statements were made by persons

[18] Mr. Eastman stated, among other things, that a survey just completed by his staff showed that of the total employees in the service of the carriers on January 1, 1934, approximately 25 per cent or about 250,000 employees had already attained or would in the next four years attain the age of 65 or more, or would have completed 30 years of service.

whose affidavits were filed in the present case, on the basis of their observations and special investigations (Latimer, R. 179; Beyer, R. 198–199).

The failure of existing railroad pension plans to deal with the situation is due in part to the fact that some carriers have no pension systems,[19] but primarily to the fact that the compulsory retirement age under the plans of the carriers who do have pension systems is normally fixed at 70 years and frequently no compulsory retirement age is fixed (R. 197 and attached statement). The evidence shows that in comparable industries the age of 65 is generally regarded as the desirable maximum age limit for retirement (R. 179; see also *Employees' Retirement Annuities,* Chamber of Commerce of the United States, 1932, p. 21). The proportion of persons 65 or over in the railroad industry is substantially greater than that in other heavy industries (R. 179). According to the cen-

[19] In this connection it is of interest to note the illustration contained in the affidavit of Mr. Clark of a situation upon one of the railroads which has no pension system. The railroad had 21 men among its mail and baggage handlers who were 65 years of age or over, 4 being over 75, 6 over 70, and 11 between the ages of 65 and 69. Mr. Clark stated that the officers of the company, perhaps more than anyone else, realized that these 21 men could not render satisfactory service, but they were retained in the service because they were men who had grown old in the service and had rendered excellent service in the past, and because the company had no pension system. Mr. Clark ventured the opinion that if these 21 men were retired, 10 young and vigorous men could do their work. Numerous similar situations exist, Mr. Clark indicated (R. 191).

sus of April 1, 1930, 3.43 percent of steam railway employees were 65 or over; 2.26 percent in coal mining; 1.5 percent in oil wells; 2.33 percent in the chemical industry; 2.61 percent in iron and steel; and 2.27 percent in transportation other than railroads (*Ibid.*). When it is considered that the railroad industry has been covered by pension systems more than any other, these comparisons become even more significant.

Moreover, the typical railroad worker was, on the 1930 census date, "about four years older than the typical employee in all mechanical industries; over seven years older than the typical employee in all of the industries other than the railroads; and eight and one-half years older than the typical employee in transportation and communication other than railroads. The comparison, if made at present, would undoubtedly show an even wider discrepancy." (R. 179.)

Furthermore, the percentage of employees over 65 in the railroad industry has increased sharply since 1930. Respondents' evidence discloses that the percentage increased to 4.3 percent in 1932. (Statement showing number of employees, attained ages and years of service, Exhibit A to affidavit of Mr. Parmelee, R. 46, 61; R. 225.) According to attained age in 1934, the percentage of persons 65 and over had risen to 4.65 percent, making an increase of 35 percent in about 4 years (R. 225). Because of the continued decline in retirements dur-

ing 1934, already mentioned, the percentage was even greater on the effective date of the Act than at the beginning of the year (*Ibid.*). There are in the service at the present time not less than 48,000 persons who have passed their 65th birthday (*Ibid.*). Their average annual compensation in 1933 being approximately $1,765, their total annual compensation amounted to about $85,000,000. The average annual compensation of all railroad employees in 1933, according to the Coordinator's figures, was $1,319. Accordingly, Mr. Latimer concludes that pay-roll economies would undoubtedly be produced by the retirement of these employees over 65 and their replacement by fewer younger men (*Ibid.*; see also R. 32). The latter would undoubtedly be more vigorous, would do more work, and would receive less pay.

The affidavit of Mr. Parmelee (R. 133–136), introduced in rebuttal, in no way refutes the facts just stated, and may have misleading implications. Mr. Parmelee does not even purport to deny that the amount of superannuation on the railroads has increased enormously and is now greater than it ever was in the past. His affidavit is confined to an attempt at showing, on the basis of census figures for 1930, that on the census date in other employments and in industry as a whole the percentage of superannuation was greater than in the railroad industry. The comparisons of Mr. Latimer above referred to are not questioned, but additional comparisons are made. However, these ad-

ditional comparisons are not persuasive, and, as indicated, may be misleading because the employments selected for comparison are in no way comparable to the railroad industry. The industries mentioned are largely those in which self-employment is common and which do not have the high degree of organization which is present in the railroad industry. In agriculture, trade, domestic and personal service, professional service, forestry and fishing (R. 135) there is no need to guard against superannuation in any way comparable to that in the railroad industry. The industries mentioned present no problem of efficiency of a highly organized unit, composed of many interdependent functions. Substantially the same is true also of the occupations listed in the Parmelee affidavit—farm laborers, blacksmiths, carpenters, painters, glaziers, teamsters and carriage drivers, and retail dealers (R. 135).[20]

Recapitulating, existing carrier railway pension systems are inadequate because: (1) they fail to provide old age security for any substantial portion of railway employees; (2) the amounts of pensions paid have been insufficient; (3) existing plans

[20] Because it is on its face incomplete, and in one major respect, at least, definitely erroneous, we have refrained from referring to the finding of the lower court on the subject of superannuation among railway employees (Finding 20, R. 270). The finding that respondents have no higher percentage of employees of 65 years of age or over than other heavy industries is directly contrary to all the evidence. Moreover, as indicated, there is no conflict in the evidence.

discriminate unduly between different classes of employees with respect to the likelihood of particular employees ultimately retiring on pensions; (4) they also discriminate unduly between classes with respect to the amount of annuity received upon retirement; (5) existing plans confer upon the employees no enforceable rights and, therefore, give them no definite assurance of security in old age; (6) in the face of increasing costs, the carriers' plans have made no provision for future pension liabilities; and particularly (7) they have failed effectively to deal with the problem of superannuation. For these reasons, "the railway pension systems * * * were facing a crisis with a threat of a break-down which was becoming increasingly more probable" (R. 180).

**B. The Calculated Effect of the Railroad Retirement Act**

In contrast with the voluntary systems, the system established by the Retirement Act provides assurance to the employees of old age security. By elimination of the requirement of continuity of service and continuation in the service of one carrier until the retirement date, the Act removes the basic reason why so few persons become eligible for pensions under the existing systems. It also removes the factor which has tended to bring about the discrimination which has existed in favor of the higher paid classes as against the lower paid classes of railway employees, with respect to both (1) the likelihood of obtaining any pension, and

(2) the amount of annuity received. Furthermore, the computation of annuities under the Act on a graduated basis (the following percentages of monthly compensation being used: 2% of first $50; 1½% of the next $100; and 1% of compensation in excess of $150 and up to $300) is also calculated to alleviate the discrimination against the lower paid classes with respect to the amounts of annuities paid to them under the existing carrier plans (Sec. 3).

Under the Retirement Act the amounts of annuities to be received by retired employees will, in the case of retirements in the immediate future, be approximately 50 percent of the rate of pay during the last 10 years of service, and will be slightly less than this in the years to come (R. 184). Although this is below the amounts of annuities now being granted under voluntary pension plans in other industries (R. 184), it will undoubtedly be in excess of the amounts of annuities (R. 173) now being paid under the railway pension plans.

With respect to the removal of superannuation, the Act fixes the compulsory retirement age at 65, uniformly applicable to all carriers subject to the Act [21] (Sec. 4).

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[21] The provision in Section 4, whereby retirement may be extended by written agreement between the carrier and the employee for successive periods of one year each until age 70, provides a reasonable degree of flexibility, and permits the retention in service of such employees over 65 who are still capable of working efficiently.

The Railroad Retirement Act improves upon the desirable elements of the voluntary pension plans and adds features which are calculated to promote fairly the objectives of a sound industrial pension system:

*Promotion of economy.*—Waste is eliminated by the systematic removal of superannuated workers from the service and the substitution of younger men who, while receiving less pay, are able to produce more, and by the removal of the "drag" which older workers exert upon the entire working force. The efficiency of the force is improved also when the avenues of promotion are opened "and the young and ambitious worker need no longer feel that only death can bring him an opportunity to advance." (National Industrial Conference Board, *Elements of Industrial Pension Plans, supra,* at p. 10). In the words of the Conference Board (*Ibid.*):

> Opportunity breeds ambition and energy in all ranks of the working force, with highly desirable, if not definitely measurable results.

In the railroad industry particularly there is need for these influences. On account of the seniority rules, the tendency is to retain older men in the service (R. 34, 139, 154–155, 239). Since 1920 there has been a constant diminution in railroad employment. Class I carriers employed 2,197,824 persons in August 1920 (R. 139). This number was re-

duced to 1,821,490 in June 1927, and in June 1934 stood at 1,070,837 (*Ibid.*). Under the practice of laying off the younger men with shortest service periods, in the absence of provision for the systematic retirement of the older workers, no opportunity exists for younger men and women to enter the service. The result is that (R. 199):

> the railroad industry is now severely handicapped through the inadequacy of the influx of young employees to provide necessary candidates for the many positions in the railroad industry which demand responsibility, alertness, resourcefulness, imagination, and cooperative ability.

*Improvement of morale.*—Efficiency is stimulated also by providing assurance to employees of old age security and thereby improving the morale of the workers, particularly those at middle age and over. That this is not mere theory is illustrated by the following statement of the Industrial Conference Board (*Elements of Industrial Pension Plans, supra,* p. 9):

> Closely related to the consideration of the effect of a pension plan on efficiency of operation is its influence on morale, particularly the morale of older workers. It has repeatedly been demonstrated that a contented working force is normally an efficient working force; that a mind at ease can be concentrated more effectively upon the

task at hand. In the absence of any definite understanding, it is natural that an employee reaching advanced years should worry as to how long he will be able to retain his job and what will happen to him when he loses it. Relieved of that dark prospect, the employee can concentrate on his work, endeavoring to hold his job as long as possible because by so doing he will increase the amount of his pension.

*Safety in interstate transportation.*—In the light of what has been said, it seems not open to serious doubt that the Retirement Act is intended and is calculated to promote efficiency and economy; and in an industry having as many hazardous occupations as the railway industry, improvement in personnel conditions is likely to mean increased safety.

The increased efficiency and safety brought about by the Act and the improvement in labor conditions and relations will necessarily lead to improved carrier service and make for a more adequate national transportation system.

*Position of respondents.*—Respondents, nevertheless, take sharp issue with the view that the Act will promote either efficiency or safety. It may be a sufficient answer to their contentions that since there is a substantial amount of evidence to support the judgment of Congress, its action will not be held to be arbitrary or unreasonable. In *Radice* v. *New York*, 264 U. S. 292 (which upheld

the validity of a state law prohibiting employment of women in restaurants for night work) this Court said (pp. 294–295):

> Where the constitutional validity of a statute depends upon the existence of facts, courts must be cautious about reaching a conclusion respecting them contrary to that reached by the legislature; and if the question of what the facts establish be a fairly debatable one, it is not permissible for the judge to set up his opinion in respect of it against the opinion of the lawmaker. The state legislature here determined that night employment of the character specified, was sufficiently detrimental to the health and welfare of women engaged in it to justify its suppression; and, since we are unable to say that the finding is clearly unfounded, we are precluded from reviewing the legislative determination.

See also: *Bunting* v. *Oregon*, 243 U. S. 426.

However, the evidence relied upon by respondents is not convincing. They rely on the statements of several of their high executives (R. 235–260) that their existing pension plans have tended to promote efficiency in only two ways[22]: (a) by encouraging continuity of service, and (b) by in-

[22] The President of the Union Pacific has, in addition, the "recollection and the impression that in the origin of railroad pension plans the hope that the provisions of such pensions would have a tendency to reduce strikes on the part of employees was one of the reasons for their adoption by railroad companies", though he states that it is his experience

stilling in their employees a feeling of loyalty to their particular employers; that neither of these ways is open under the Retirement Act; and that (some of them add, R. 241–242, 247, 249, 260) efficiency could not possibly be promoted by a pension plan in any other ways. The last statement is entirely without force in view of the evidence above set forth as to the other ways in which industrial pension plans are calculated to promote efficiency and economy (*supra*, pp. 39–47, 70–72).

It may well be that the voluntary plans are intended to promote efficiency and safety by inducing loyalty and continuity of service. It could also be true that these means were ignored in the Railroad Retirement Act, and yet the fact that Congress emphasized different means does not indicate that the Act will not promote efficiency and safety. As the court below indicated, this is a matter involving "questions of wisdom and propriety, rather than of power" (R. 263).

Congress has deliberately chosen the means of providing old age security for all railroad employees, measured by years of service, but not dependent upon continuity of service with any

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that the pension plans have no deterrent effect upon strikes (Gray, R. 236). Mr. Loree states that one of the purposes of the pension system on his road is "to oppose and counteract, so far as practicable, influences principally originating outside of the personnel of said railroad which, at times, become very effective and are planned and intended, and actually do tend, to impair and destroy the free relations between the railroad and its employees" (Loree, R. 256).

particular carrier, as is required under the existing railway pension systems. If it were true, as claimed, that the Act will not encourage continuity of service and will remove the incentives for employee loyalty to employer, it has other virtues, as has been indicated; for example, it provides greater assurance to employees of old age security than has been the case under the carriers' pension plans, and is likely to be productive of efficiency through improvement of employee morale. It appears to have been the policy of the railways to hold the pension out to their employees as a reward for long and faithful service (R. 235–260). In pursuance of this policy, they have retained complete control over their pension systems, have been careful to confer no rights upon their employees, and have paid all the costs themselves. A fundamentally different conception underlies the Retirement Act, namely, that it is in the interest of efficient operation of the railroads, and in the interest of the employees and the public as well, to remove fear of old-age dependency. Recognizing that the problem is a mutual one of both employers and employees, the Act provides for contributions to be made toward the cost by both.[23]

It is worth observing, finally, that if the two objectives of the carrier pension plans have been to induce loyalty and continuity of service, they

[23] This is in accordance with the present tendency in private pension plans of providing for employee contributions. Latimer, *op. cit.*, Vol. II, pp. 932–933.

do not appear to have been particularly successful. With respect to loyalty, employee representatives deny that the railway pension plans have enhanced the feeling of loyalty on the part of employees (R. 221, 223). The fact that but a small percentage of railroad employees remain in the service of a particular carrier continuously for a sufficient period of time to earn a pension under the existing pension plans (R. 173) would indicate that the objective of inducing long continuity of service has also not been successful. (See also Latimer, *Industrial Pension Systems,* Vol. II, pp. 751–752.)

The causes of labor turnover are, in any case, numerous and varied. The turnover is greatest, of course, among employees in the younger age groups. After the employees have reached middle age, the probabilities of voluntary shifts in employment are small. There are powerful deterrents, apart from loss of pensions. Change then involves serious disturbance to home, family, and settled habits. The prospects of finding other employment are not very good. The railroads generally have rules proscribing the employment of inexperienced persons over 35 years of age, or experienced persons over 45 (R. 164). Finally, in the railroad industry, a shift of employment involves the loss of the employee's seniority rights, which may constitute a more valuable interest than the prospect of a pension. The extent to which the younger employee may be deterred from shifting

employment by the prospect of loss of pension is conjectural. The advantage of the pension is so distant in the future, and its ultimate acquisition so uncertain, that it is probably easily sacrificed for the certain advantage of immediate betterment in employment.

To the extent, however, that lowering of industrial labor turnover is desirable and a justifiably hoped-for advantage of a pension system, it is submitted that the Railroad Retirement Act will effectively tend to promote that end. The Act will certainly tend to retain in the railroad industry employees already there, and so long as it is desirable to remain in the industry, employees undoubtedly, for the most part, will prefer to remain with the same carriers, particularly in order that they may safeguard their seniority rights. Mr. Latimer observed, also, that insofar as employees may shift from one carrier to another, this will tend to effectuate the national policy introduced in the Transportation Act, 1920, of providing a uniform national system of transportation, for the transfer of employees from one carrier to another, he stated, will tend to make for uniformity of service standards and bring about uniformity of policy and technique, which will be of great value to the unification of the national railway system (R. 225).

In substance, respondents' objection is that Congress, in legislating for the purpose of promoting efficiency and safety, has not chosen the means of their liking. But the Act of Congress is not

to be condemned because, with a choice of means available, Congress chose the more progressive method already tried in the laboratory of industrial experience and approved and recommended by those qualified to speak.

## III

### THE PURPOSE, STATED IN THE ACT, OF PROMOTING EFFICIENCY AND SAFETY, IS CONTROLLING

Section 2 (a) of the Act declares that the purposes of the retirement system are to provide for the satisfactory retirement of aged employees, to promote efficiency and safety in interstate transportation, and to make possible greater employment opportunity and more rapid advancement of employees in the service of carriers. It provides further that the Act shall be administered and construed "with the intent and for the purpose of providing the greatest practicable amount of relief from unemployment and the greatest possible use of resources available for such purpose and for the payment of annuities for the relief of superannuated employees." The bill of complaint charges that the real ends and aims of the Act are not the promotion of efficiency and safety, but to provide for the satisfactory retirement of aged employees, and to make possible greater employment opportunity and more rapid advancement of employees in the service of carriers; reference is made to the statement in Section 2 (a) as to the manner in which the Act is to be administered and construed, and it is alleged that none of the "ends and aims"

therein indicated "is within any power delegated to Congress by the Constitution" (R. 6). In the court below, respondents relied upon *Hammer* v. *Dagenhart*, 247 U. S. 251, and *Bailey* v. *Drexel Furniture Company*, 259 U. S. 20.

It is clear from a mere examination of the Retirement Act that the retirement and pension system embodied therein was not adopted by Congress as a pretext for the accomplishment of unauthorized purposes. The Act is confined to the establishment of a retirement and pension system which will be sound and adequate, and the preceding discussion demonstrates that Congress reasonably believed that such a system would lead to increased efficiency and economy, as well as safety. Nothing contained in Section 2 (a) indicates the contrary.

Making possible more rapid advancement of employees in the service of carriers, as well as the payment of annuities for the relief of superannuated employees, as has been shown, are but parts of a sound and adequate retirement and pension plan which help to make such a plan effective toward the promotion of efficiency and economy. They "are not ends in and of themselves but means to the legitimate end of" promoting efficiency and safety in interstate transportation. Compare *Stephenson* v. *Binford*, 287 U. S. 251, 272.

Respondents place great emphasis upon the reference to relief from unemployment. It is unnecessary to consider whether in the present state of railroad labor conditions Congress would have the

power to deal with the relief of railway unemployment in the interest of improving the national transportation system, since it is obvious that the relief of unemployment is not one of the essential aims of the Retirement Act. If Congress had the power to pass the Act in order to promote efficiency and safety, the fact that the purpose of relieving unemployment will also be served does not invalidate the Act. Compare *Arizona* v. *California*, 283 U. S. 423, 456; *Smith* v. *Kansas City Title Co.*, 255 U. S. 180, 210; and see also *Hampton & Co.* v. *United States*, 276 U. S. 394, 412.

The reference to unemployment relief in Section 2 (a) is "more in the nature of a hopeful characterization of an object deemed desirable if, and in so far as, it may be attainable * * *." *Ann Arbor R. R. Co.* v. *United States*, 281 U. S. 658, 668. That this is so is apparent from the fact that, although the Retirement Board is directed to administer and construe the Act, among other things, in order to provide "the greatest practicable amount of relief from unemployment and the greatest possible use of resources available for such purpose", no discretion rests with the Board with respect to the expenditure of sums collected from employers and employees.

Certainly, the Court will not give to the language of Section 2 (a) a strained construction which might raise a serious constitutional question. *Ann Arbor R. R. Co.* v. *United States*, 281 U. S. 658, 669.

## IV

### ENACTMENT OF THE RETIREMENT ACT IS WITHIN THE POWER OF CONGRESS UNDER THE COMMERCE CLAUSE

Consideration of the question whether the Retirement Act is invalid in so far as it applies to *all* of respondents' employees, including those claimed not to be directly engaged in interstate commerce, will be postponed for the moment (see *infra*, p. 93), in order that there may be considered first the broader question whether Congress is authorized to enact retirement and pension legislation applicable to interstate carriers. The answer to this question will aid also in the determination of whether Congress exceeded its power in including all carrier employees.

The court below "was not prepared to say" that Congress did not possess authority to establish a compulsory retirement and pension system for the railroad industry (R. 262). Respondents do not appear to dispute the power of Congress to enact legislation for the purpose of promoting the efficiency and safety of the national transportation system. Their position seems to be, rather, that the Retirement Act is not really intended, and is not calculated, to accomplish those purposes. In view of the previous discussion it is clear that the Act is both intended and calculated to promote efficiency and safety. That Congress has the power to enact legislation, such as the Retirement Act, for this purpose is equally clear. Efficiency in the

sense intended means, of course, not merely lowest cost operation but also adequacy of service and proper discharge of the industry's obligation to the public, with due regard for the interests of those concerned in it.

The commerce power has been defined by this Court as "the power to regulate; that is, to prescribe the rule by which commerce is to be governed. This power, like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the Constitution." *Gibbons* v. *Ogden*, 9 Wheat. 1, 196. " 'To regulate' in the sense intended is to foster, protect, control, and restrain, with appropriate regard for the welfare of those who are immediately concerned and of the public at large." *Second Employers' Liability Cases*, 223 U. S. 1, 47. "The power to regulate commerce is the power to enact 'all appropriate legislation' for its 'protection and advancement' (*The Daniel Ball*, 10 Wall. 557, 564); to adopt measures to 'promote its growth and insure its safety' (*County of Mobile* v. *Kimball*, 102 U. S. 691, 696–697); to 'foster, protect, control, and restrain' (*Second Employers' Liability Cases*, 223 U. S. 1, 47)." *Texas & New Orleans Railroad Co.* v. *Brotherhood of Railway and Steamship Clerks*, 281 U. S. 548, 570.

The Retirement Act applies only to the railroad industry, and railroading continues to be the prime

example of interstate commerce. All of respondents are already subject to the Interstate Commerce Act.

A brief survey of the "minutely detailed supervision, including that of their relations to their employees, to which the railroads of the country have been gradually subjected by Congress through its power over interstate commerce" (*Wolff Packing Company* v. *Court of Industrial Relations*, 262 U. S. 522, 543) will demonstrate that the Retirement Act falls well within the scope of the commerce power. After being limited for many years to highly restricted regulation of rates in interstate transportation, Federal supervision of interstate carriers has developed into regulation of the railroad industry, as a unified whole, in all respects in which regulation has been deemed necessary in order to insure that the industry would furnish the country a proper and adequate national transportation system.

The broad policies initiated by the Transportation Act, 1920, have many times been expounded and enforced by this Court. In the *New England Divisions Case*, 261 U. S. 184, 189–190, the Court said:

> Transportation Act, 1920, introduced into the federal legislation a new railroad policy. *Railroad Commission of Wisconsin* v. *Chicago, Burlington & Quincy R. R. Co.*, 257 U. S. 563, 585. Theretofore, the effort of Congress had been directed mainly to the

> prevention of abuses, particularly those arising from excessive or discriminatory rates. The 1920 Act sought to ensure, also, adequate transportation service. That such was its purpose, Congress did not leave to inference. The new purpose was expressed in unequivocal language. And to attain it, new rights, new obligations, new machinery were created. The new provisions took a wide range. Prominent among them are those specially designed to secure a fair return on capital devoted to the transportation service.

In sustaining the "recapture" provisions of the Transportation Act in *Dayton-Goose Creek Railway Company* v. *United States,* 263 U. S. 456, the Court, after referring to the *Wisconsin* and *New England Divisions* cases, said (p. 478):

> In both cases it was pointed out that the Transportation Act adds a new and important object to previous interstate commerce legislation, which was designed primarily to prevent unreasonable or discriminatory rates against persons and localities. The new Act seeks affirmatively to build up a system of railways prepared to handle promptly all the interstate traffic of the country. It aims to give the owners of the railways an opportunity to earn enough to maintain their properties and equipment in such a state of efficiency that they can carry well this burden. To achieve this great purpose, it puts the railroad systems of the country more completely than ever under

> the fostering guardianship and control of the Commission, which is to supervise their issue of securities, their car supply and distribution, their joint use of terminals, their construction of new lines, their abandonment of old lines, and by a proper division of joint rates, and by fixing adequate rates for interstate commerce, and in case of discrimination, for intrastate commerce, to secure a fair return upon the properties of the carriers engaged.

Concern for the preservation, promotion, and protection of the national transportation system has required, as this Court has several times found, the extension of Federal "guardianship and control" beyond the matter of interstate rates alone, to matters which previously might have been left unregulated or subject to State regulation. The Interstate Commerce Commission was thus given the power to regulate and fix purely intrastate rates in order that intrastate traffic might be made to produce its fair share of the earnings required to meet maintenance and operating costs and to yield a fair return on the value of property devoted to transportation service, both interstate and intrastate (*Illinois Commerce Commission* v. *U. S.*, 292 U. S. 474; *United States* v. *Louisiana*, 290 U. S. 70, 75; see also *Wisconsin R. R. Commission* v. *Chicago, Burlington & Quincy R. R.*, 257 U. S. 563, *supra*); to order divisions of joint rates between groups of carriers with a view to caring for the

financial needs of the weaker roads (*New England Divisions Case*, 261 U. S. 184, 190); to recapture excess earnings of interstate carriers, including earnings derived from intrastate traffic (*Dayton-Goose Creek Ry. Co.* v. *United States*, 263 U. S. 456, 478); to authorize extensions or abandonments of lines, even when the extensions and abandonments almost entirely concern only intrastate traffic (*Transit Commission* v. *United States*, 284 U. S. 360; *Colorado* v. *United States*, 271 U. S. 153; *Texas & New Orleans R. R. Co.* v. *Northside Belt Ry. Co.*, 276 U. S. 475, 479; *Texas & Pacific Ry. Co.* v. *Gulf, Colorado and Santa Fe*, 270 U. S. 266, 277); to order the establishment of junctions and physical connections between interstate carriers (*Alabama & Vicksburg Ry. Co.* v. *Jackson and Eastern Ry. Co.*, 271 U. S. 244); to approve the acquisition of control of one carrier by another (see *Chicago Junction Case*, 264 U. S. 258; *Texas* v. *United States*, 292 U. S. 522); to require joint use of facilities (*Atlantic Coast Line Railroad Co.* v. *United States*, 284 U. S. 288) and where facilities are jointly used, to supervise rentals to be paid (*Transit Commission* v. *United States*, 289 U. S. 121); and to regulate the issuance of securities by carriers, regardless of the purpose of the issuance (*Pittsburgh and West Virginia Ry. Co.* v. *Interstate Commerce Commission*, 293 Fed. 1001; *cf. United States* v. *Chicago, Milwaukee, St. Paul & Pacific R. R. Co.*, 282 U. S. 311).

The broad scope of the authority of Congress in the field of railroad labor conditions and relations is evidenced by the numerous enactments of Congress in this field which have met with the approval of this Court. Congress has enacted safety appliance laws, some of which were directed mainly or exclusively toward the safety of employees, e. g., Ash Pan Act (c. 225, 35 Stat. 476) and the act requiring cars to be equipped with grab-irons and hand-holds, and with automatic couplers (c. 196, 27 Stat. 531). It is to be noted that the safety appliance acts cover all equipment of interstate carriers, whether used in interstate or intrastate commerce. *Southern Railway Co.* v. *United States*, 222 U. S. 20; *Texas and Pacific Ry. Co.* v. *Rigsby*, 241 U. S. 33. Congress has enacted legislation limiting the hours of service of employees "actually engaged in or connected with the movement of any train" of an interstate carrier. *Baltimore & Ohio R. R. Co.* v. *Interstate Commerce Commission*, 221 U. S. 612. The Adamson Act (c. 436, 39 Stat. 721) fixed the wages of certain classes of railroad employees during an emergency. *Wilson* v. *New*, 243 U. S. 332. Federal regulation of labor relations in the railroad industry has been active and of long standing, culminating in 1926 with the enactment of the Railway Labor Act, which was substantially amended almost simultaneously with the passage of the Retirement Act (44 Stat. 577, 48 Stat. 1185; U. S. C., Title 45, Sections 151–163). *Texas &*

*New Orleans R. R. Co.* v. *Brotherhood of Railway & Steamship Clerks*, 281 U. S. 548, *supra*.

It is noteworthy, furthermore, that in the Emergency Transportation Act of 1933 (c. 91, 48 Stat. 211, U. S. C., Title 49, Section 250), the provisions of which this Court has said "confirm and carry forward the purpose which led to the enactment of Transportation Act, 1920" (*Texas* v. *United States*, 292 U. S. 522, 530), Congress found it necessary to assume even greater control over the railroad industry than ever before. It created the office of Coordinator of Transportation with the function, broadly, of directing the elimination of waste in railroad operation and discovering further means and methods of producing operating economies. Of special significance is Section 13 of this Act, previously referred to, which directs the Coordinator to investigate and consider means "of improving transportation systems throughout the country * * * including, also, the stability of railroad labor employment and other improvement of railroad labor conditions and relations." The report of the Senate Committee on Interstate Commerce on the bill which became the Emergency Transportation Act states in part as follows (Senate Report No. 87, 73d Cong., 1st Sess., p. 2):

> It is to be hoped the Coordinator to be appointed under this legislation may be able to standardize equipment, cut off unnecessary and fabulously high paid executives, *bring about a better relation between the carriers*

*and their employees,* and provide better service for the public. (Italics supplied.)

The Retirement Act is obviously calculated to improve labor conditions and relations and, in this way, to promote efficiency in the railroad industry. The fact that Congress was so concerned about railroad labor conditions and relations as to call for a study by the Coordinator of means of improving them negatives any contention that may be made that existing labor conditions and relations are stable and normal and require no legislative action.

Viewing the power of Congress from another aspect, it is to be noted that approximately 60% of all operating expenses of interstate carriers are expended as direct labor costs. Annual Report, Interstate Commerce Commission, 1933, p. 92. If, as the history of Federal railroad legislation and the decisions of this Court sustaining it disclose, the prevention of waste and the promotion of efficiency in the management of the physical properties of interstate carriers is in the public interest and a proper subject of Federal regulation, it must follow that the promotion of the efficiency of the personnel of the carriers, the great human element in the national transportation system, is likewise within the authority of Congress. As this Court has previously said, in upholding an hours-of-service law applicable to employees in the train service of interstate carriers, "Congress was not limited to

the enactment of laws relating to mechanical appliances, * * *" (*Baltimore & Ohio Railroad Company* v. *Interstate Commerce Commission*, 221 U. S. 612, 618–619.)

It was shown at the Congressional hearings on the Retirement Act that interstate carriers have been spending in excess of 30 millions of dollars per year in pension payments.[23] Despite reductions in annuities and reduced retirements, pension costs were increasing year by year, until the pension systems were facing a crisis with the threat of a breakdown (R. 179–180). At the same time, the pension systems were inadequate and ineffective for the accomplishment of the essential purposes of sound pension plans.[24] Here was a condition, it is submitted, affecting on the one hand the finances of the carriers, and on the other hand vitally affecting railroad labor relations and conditions, which was within the province of Congress to consider and to correct.

*Attempted separation of retirement and payment of annuities.*—The bill of complaint charges that the Retirement Act imposes upon respondents a burden which, if it exists at all, should be borne

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[23] Hearings before Subcommittee of Senate Interstate Commerce Committee on S. 3231, 73d Cong., 2d sess., p. 10.

[24] In both Senate and House reports on the bill which became the Retirement Act, it is observed that "In most part, the pensions provided for are inadequate, and the cost to the railroads is mounting year by year." (Senate Report No. 974, 73d Cong., 2d Sess., p. 2; House Report No. 1988, 73d Cong., 2d sess., p. 2).

by society as a whole (R. 9). It was suggested in the court below that, assuming that Congress may require the carriers to retire their superannuated workers, it does not follow that Congress may compel the carriers to contribute toward payment of annuities to them thereafter.

This attempted separation of retirement and payment of annuities is unreal in any practical sense, since it would be impossible to require carriers to cast old workers aside without means of support. As has been stated, employers have themselves recognized this obstacle to discharging aged workers without some form of pension. (Supra, p. 40.) Of more importance, however, the argument ignores the advantage of increased efficiency which results from the removal of the employee's fear of old-age dependency.

Unquestionably the employees and the public will benefit materially from the Act. The requirement that the railroads contribute two-thirds of the cost of annuities to be paid to retired employees is supported on the basis of the resulting improvement in the efficiency, safety, and quality of the service. The expenditures required by the Act are likely to be offset to a substantial extent by actual pay-roll savings resulting from the fact that fewer persons, receiving lower wages, will be required to replace those retired (R. 181, 191, 205). The balance is justified by the intangible but real benefits which will accrue to the carriers in other ways, i. e., by

removal of the drag exerted upon the working forces by superannuated workers, making room for advancement of the younger workers, and improvement in the morale of the employees by removing their concern regarding old-age dependency; also by the improvement in the service which the carriers will render to the public.

There are analogous situations under the Interstate Commerce Act wherein carriers may be required to expend moneys in order to improve their service in the public interest. The Interstate Commerce Act authorizes the Interstate Commerce Commission to require carriers to make connections with other carriers (*Alabama and Vicksburg Ry. Co.* v. *Jackson and Eastern Ry Co.*, 271 U. S. 244) and to provide themselves with safe and adequate facilities for performing their car service, and to extend their lines, where reasonably necessary in the public interest (Interstate Commerce Act as amended, Sec. 1 (21), Title 49, U. S. C., Sec. 1 (21)). See *Interstate Commerce Commission* v. *Oregon-Washington R. R. Co.*, 288 U. S. 14.

*Conclusion.*—It is clear from the authorities cited that Congress possessed the power under the Commerce Clause to pass the Retirement Act in order to remedy the inadequacies of the existing carrier pension plans in the interest of promoting efficiency and safety in interstate transportation; also, in order to improve employment conditions and to aid in the establishment of labor relations in

the railroad industry on a rational and stable basis; and, in general, to enhance the quality of the service rendered by the industry.

## V

### THE ACT IS VALID IN ITS APPLICATION TO ALL EMPLOYEES OF INTERSTATE CARRIERS; AND ITS VALIDITY IS NOT AFFECTED BY *"THE EMPLOYERS' LIABILITY CASES"*

The first ground on which the court below held the Retirement Act invalid was that it applied to "all employees without regard to distinction between those engaged in interstate commerce, those engaged in intrastate commerce, and those engaged in activities which do not constitute commerce at all" (Conclusion of Law 1, R. 273). The court relied (R. 263) upon *The Employers' Liability Cases*, 207 U. S. 463. The court held also that the Act was not separable with respect to employees who were, in the opinion of the court, not properly included therein (R. 273). The court found that a total of 211,107, or nearly one-fifth of the total number, of respondents' employees, were employees whose work and duties were not in interstate commerce or transportation, but were exclusively confined to other phases of respondents' business (R. 267). Their total annual compensation, the court found, is not less than $300,000,000 (R. 268).

*Respondents' statistics regarding employees claimed not to be subject to Congressional power.*— The number of employees claimed not to be en-

gaged in interstate commerce was determined by the use of a questionnaire which was sent, under the direction of their counsel, to each of respondents (R. 49–53). The questionnaire enumerated 16 classes of duties [25] and called for a report as to the number of persons performing those duties in the month of May 1934. The carriers did not indicate for what periods of time the employees reported in the replies to the questionnaire had held their par-

[25] The 16 classifications are as follows (R. 52–53): (1) Executive and General Officers; (2) Finances, custody, and administration of securities or funds; (3) Corporate proceedings or records; (4) Real Estate, taxes, and titles; (5) Experimentation and Research; (6) Claims and litigation; (7) Accounting; (8) Advertisement, industrial development, and traffic solicitation; (9) Management, operation, care, or protection of buildings or lands not devoted to or used in connection with transportation; (10) Work relating to the construction of buildings and lines of railway; (11) Work relating to the construction of new equipment; (12) Work relating to reconstruction or major repair of equipment withdrawn from transportation service; (13) Foremen and laborers in stores, reclamation, and timber-treating plants; (14) Storekeepers, sales agents, and buyers; (15) Pumping-equipment operators, stationary engineers, and firemen, oilers, coal passers, and water tenders; (16) All other employees not engaged in interstate commerce not included in the preceding classes * * *.

The questionnaire briefly explained the scope of each of these classes and gave instructions that particular employees, for example a vice president in charge of operation and his staff, should not be included (R. 53–54). Subsequent to receipt of the returns of the questionnaire, an additional group of employees, among them persons engaged in "actual traffic solicitation (not including their clerks and stenographers)" were eliminated (R. 58, 59–67).

ticular positions or what positions they had held or what work they may have been engaged in at previous times.

The finding of the lower court that the duties of 211,107 employees referred to "were not in interstate commerce or transportation, but were exclusively confined to other phases of" respondents' business, is not to be understood as meaning that these employees are not engaged in the transportation business of respondents. On the contrary, from an examination of the classes of employees included, it is apparent that nearly all, if not all, are in, and essential to the conduct of, the transportation business. For example, the largest class (class 12, R. 267) comprises 86,493 persons employed in repair shops and engaged in the making of major repairs on transportation equipment withdrawn from service for the purpose of repair (R. 54, 66, 69, 99). They belong to respondents' maintenance of equipment departments and have been specially segregated for the purpose of this case from employees engaged in repairing the same types of equipment on the tracks (*Ibid.*). The second largest class (class 7, R. 267), employees engaged in auditing, accounting, and bookkeeping, includes, among others, auditors of freight accounts, of passenger accounts, of station accounts, of traffic and of freight claims, and their staffs (R. 54; United States Railroad Labor Board, *Rules for Reporting Information on Railroad Em-*

*ployees*, 96–97, 118–119). These two classes alone account for more than half of those claimed not to be subject to Congressional control. It will hardly be urged that the executives and general officers and their staffs (class 1, R. 267) are not concerned with the transportation business of respondents. Employees engaged in advertising and industrial development (class 8, R. 267), of course, advertise the transportation service and develop traffic. And foremen and laborers in stores having the custody of materials and supplies "not yet incorporated in operating properties and not yet devoted to transportation services" (class 13, R. 267) are no less clearly engaged in respondents' transportation business. No phases of respondents' business other than transportation require such employees.

It is unnecessary to exhaust the list for, obviously, since respondents' business is, at least predominantly, transportation, substantially [28] all of their employees are necessary to the conduct of that business. Respondents offered no evidence to show that, in fact, the inclusion of all employees is not reasonably related, or reasonably necessary,

[28] The application of the Act to three minor classes of employees (employees engaged in miscellaneous activities such as the handling of investment accounts, securities, rents, and the sale of electric power, employees engaged in intrastate suburban service of the carriers, and employees engaged in coal mining), separately considered by respondents and the court below (Findings 11, 12, 13; R. 268), is left for consideration at the end of this section.

to the promotion of efficiency and safety in interstate transportation; or to show that the efficiency of only particular classes of employees, and not others, affects the efficiency of the national transportation system. They appear to rely exclusively upon *The Employers' Liability Cases* and to argue that Congress lacks power under the Constitution to enact legislation applying to employees who, within the meaning of the decisions construing the Federal Employers' Liability Act, are not directly engaged in interstate commerce.

*The cases under the Federal Employers' Liability Act do not indicate the limit of congressional power under the commerce clause.*—Just how the classes of employees claimed not to be engaged in interstate commerce were determined does not appear. It may be inferred that respondents have relied to a substantial extent upon decisions of this Court construing the Federal Employers' Liability Act, C. 149, 35 Stat. 65. If this is true, it is clear that respondents are in error, for this Court has made it clear that in construing that Act decision has rested not upon the extent of the power of Congress under the commerce clause, but upon "the evident purpose of Congress in adopting the Act." Thus, in *Illinois Central Railroad Company* v. *Behrens,* 233 U. S. 473, suit was brought by a member of a switching crew who was injured in the course of his employment. This Court denied him recovery under the Employers' Liability Act, but stated that Congress undoubtedly could have

extended that Act to him. The Court said (pp. 477–478):

> Considering the status of the railroad as a highway for both interstate and intrastate commerce, the interdependence of the two classes of traffic in point of movement and safety, the practical difficulty in separating or dividing the general work of the switching crew, and the nature and extent of the power confided to Congress by the commerce clause of the Constitution, we entertain no doubt that the liability of the carrier for injuries suffered by a member of the crew in the course of its general work was subject to regulation by Congress, whether the particular service being performed at the time of the injury, isolatedly considered, was in interstate or intrastate commerce. * * * *Passing from the question of power to that of its exercise,* we find that the controlling provision in the Act of April 22, 1908, reads as follows: * * * Giving to the words * * * their natural meaning * * * it is clear that *Congress intended to confine its action* to injuries occurring when the particular service in which the employee is engaged is a part of interstate commerce. (Italics supplied.)

See also: *Shanks* v. *Delaware, L. & W. R. R. Co.*, 239 W. S. 556, 558; *Kinzell* v. *Chicago, Milwaukee & St. Paul Ry. Co.*, 250 U. S. 130, 133; *Chicago & North Western Ry.* v. *Bolle*, 284 U. S. 74, 78. Since the Federal Employers' Liability Act is not

co-extensive with the power of Congress under the commerce clause, the cases arising under that Act may not be taken as the limit of Congressional authority, even with respect to the regulation of employers' liability.

That respondents exaggerate the decision in *The Employers' Liability Cases* is apparent from the fact that Congress has since, on more than one occasion, enacted legislation applicable without differentiation to all railroad employees; and the statutes referred to have been sustained by this Court. Thus, safety-appliance acts protecting employees engaged in intrastate commerce as well as those engaged in interstate commerce, were upheld on the ground that the commingling of interstate and intrastate commerce made it necessary that the same regulations cover both. *Southern Ry. Co.* v. *United States,* 222 U. S. 20; *Texas & Pacific Railway Co.* v. *Rigsby,* 241 U. S. 33. This Court said, at the last term, "the duty to protect employees by the prescribed safety appliances exists even though the vehicles and the employee injured * * * are at the time engaged in intrastate commerce." *Moore* v. *Chesapeake & Ohio Ry. Co.,* 291 U. S. 205, 214. Similarly, an act limiting the hours of service of employees of interstate carriers "engaged in or connected with the movement of any train" was sustained over the objection that employees engaged in intrastate service were included. *Baltimore & Ohio R. R. Co.* v. *Interstate Commerce*

*Commission,* 221 U. S. 612. The Railway Labor Act (c. 347, 44 Stat. 577), the constitutionality of which was questioned without success in *Texas & New Orleans Railroad Co.* v. *Brotherhood of Railway and Steamship Clerks,* 281 U. S. 548, applied to employees of carriers generally without regard to their employment in interstate commerce, much the same as does the Railroad Retirement Act.

Respondents and the court below are in error if they assume, as they appear to, that *The Employers' Liability Cases* prescribe a limit with respect to the classes of employees of interstate carriers to whom Federal commerce legislation may apply.

*The applicable principles.*—The question must be determined on the facts in each case by reference to the purposes sought to be accomplished through the legislation involved and by determination whether the inclusion of employees as defined in the statute is reasonably necessary in order to effect those purposes.

The applicable principles have been so often stated by this Court as to make their restatement here at length superfluous. They rest upon the supremacy of the Federal authority in the field of matters committed to the Federal Government under the Constitution. As stated by the Court in the *Minnesota Rate Cases,* 230 U. S. 352, 399:

> The authority of Congress extends to every part of interstate commerce, and to every instrumentality or agency by which it is carried on; and the full control by Con-

> gress of the subjects committed to its regulation is not to be denied or thwarted by the commingling of interstate and intrastate operations. This is not to say that the Nation may deal with the internal concerns of the State as such, but that the execution by Congress of its constitutional power to regulate interstate commerce is not limited by the fact that intrastate transactions may have become so interwoven therewith that the effective government of the former incidentally controls the latter. This conclusion necessarily results from the supremacy of the national power within its appointed sphere.

In *Stafford* v. *Wallace*, 258 U. S. 495, the Court was dealing with transactions and employments concededly local in character, but because they were essential to the flow of interstate commerce they were held to be subject to Federal regulation under the commerce clause. The following, taken from the Court's opinion (pp. 515–516), is significant:

> The stockyards are not a place of rest or final destination. Thousands of head of livestock arrive daily by carload and trainload lots and must be promptly sold and disposed of and moved out to give place to the constantly flowing traffic that presses behind. The stockyards are but a throat through which the current flows, and the transactions which occur therein are only incident to this current from the West to the East and from one State to another. Such

> transactions cannot be separated from the movement to which they contribute and necessarily take on its character. The commission men are essential in making the sales, without which the flow of the current would be obstructed, and this whether they are made to packers or dealers. The dealers are essential to the sales to the stock farmers and feeders. The sales are not in this aspect merely local transactions. They create a local change of title, it is true, but they do not stop the flow; they merely change the private interests in the subject of the current, not interfering with, but, on the contrary, being indispensable to its continuity. The origin of the livestock is in the West, its ultimate destination known to, and intended by, all engaged in the business is in the Middle West and East either as meat products or stock for feeding and fattening. This is the definite and well-understood course of business. The stockyard and the sales are necessary factors in the middle of this current of commerce.

See also: *Chicago Board of Trade* v. *Olsen*, 262 U. S. 1; *Tagg Bros. & Moorhead* v. *United States*, 280 U. S. 420.

The principles governing these cases underlie the Transportation Act, 1920, and related subsequent legislation wherein Congress has acted in the interest of assuring to this country an adequate national

system of transportation.[27] The Retirement Act falls within this latter class.

In the Emergency Transportation Act of 1933, Congress indicated in positive terms its concern over existing labor relations and conditions, and called for a study of means of their improvement. C. 91, Sec. 13, 48 Stat. 216. As has been shown, the Railroad Retirement Act is intended in part to accomplish the same end by improving the morale of the workers, through removing superannuated workers, thus making room for the promotion of the younger workers now in the service and the placement of new young employees in the service.

[27] The issuance of securities and the construction and the abandonment of a line of railroad have, under the Transportation Act, been subjected to Federal supervision and regulation in the interest of insuring adequate national transportation service. *Transit Commission* v. *United States*, 284 U. S. 360, *supra*; *Colorado* v. *United States*, 271 U. S. 153; *Texas & New Orleans Railroad Co.* v. *Northside Belt Railway Co.*, 276 U. S. 475, 479, *supra*; *Pittsburgh & W. Va. Railway Co.* v. *Interstate Commerce Commission*, 293 Fed. 1001, *supra*. As has been indicated, the Interstate Commerce Commission has fixed intrastate rates (*Wisconsin Railroad Commission* v. *Chicago, Burlington & Quincy R. R. Co.*, 257 U. S. 563, *supra*); has recaptured income derived from intrastate traffic (*Dayton-Goose Creek Ry. Co.* v. *United States*, 263 U. S. 456, *supra*); has regulated the amount of rental to be paid by one carrier to another, for use of facilities largely for intrastate transportation purposes (*Transit Commission* v. *United States*, 289 U. S. 121); and has authorized an interstate carrier, in defiance of State law, to remove its offices and shops from the State (*Texas* v. *United States*, 292 U. S. 522). In short, the business of interstate carriers, in all its essential aspects, has become a matter of national concern.

It bears repetition that, in believing that a compulsory retirement and pension plan would improve the efficiency of the industry and make for economies, Congress had before it the example of the general adoption of retirement systems, both in public and private employment, as well as the deliberate conclusions reached after years of exhaustive research and investigation by industrial organizations.

In no better way, perhaps, can the importance of the railway personnel be illustrated than by the fact that approximately 60% of the operating expenses of carriers are devoted to the payment of wages. Annual Report, Interstate Commerce Commission, 1933, p. 92. It seems hardly necessary to observe, either, that efficiency of the transportation system is dependent upon the efficiency of every part of that personnel. In *Colorado* v. *United States,* 271 U. S. 153, *supra,* the State of Colorado contested the validity of an order of the Interstate Commerce Commission authorizing the abandonment of a branch line of an interstate railway lying wholly within the State. In overruling the contention that the Commission lacked power to authorize abandonment as respects intrastate traffic, the Court said (p. 164):

> This railroad, like most others, was chartered to engage in both intrastate and interstate commerce. The same instrumentality serves both. The two services are inextricably intertwined. The extent and manner

> in which one is performed necessarily affects the performance of the other. *Efficient performance of either is dependent upon the efficient performance of the transportation system as a whole.* (Italics supplied.)

In the *Dayton-Goose Creek Railway* case, 263 U. S. 456, *supra,* in referring to the objection of the railroad that the sum sought to be recaptured included net income from intrastate operations, the Court said (p. 485):

> In solving the problem of maintaining the efficiency of an interstate commerce railway system which serves both the States and the Nation, Congress is dealing with a unit in which state and interstate operations are often inextricably commingled. When the adequate maintenance of interstate commerce involves and makes necessary on this account the incidental and partial control of intrastate commerce, the power of congress to exercise such control has been clearly established. *Minnesota Rate Cases,* 230 U. S. 352, 432, 433; *Illinois Central R. R. Co.* v. *Behrens,* 233 U. S. 473, 477; *The Shreveport Case,* 234 U. S. 342, 351; *Illinois Central R. R. Co.* v. *State Public Utilities Comm.,* 245 U. S. 493, 506; *Wisconsin Railroad Commission* v. *Chicago, Burlington & Quincy R. R. Co.,* 257 U. S. 563.

The claim is made in this case that one-fifth of the entire personnel, receiving compensation of not

less than $300,000,000 annually, is beyond the regulatory powers of Congress. It seems inconceivable that Federal supervision of abandonments of intrastate lines of interstate carriers (involving comparatively insubstantial burdens upon interstate commerce, *Transit Commission* v. *United States,* 284 U. S. 360) is necessary to insure the efficient operation of the industry, but that supervision of one-fifth of the entire personnel, receiving great sums as annual compensation, is not equally necessary for the same purpose. It is pertinent to point out that the existing pension plans of the carriers are not limited to employees in the train service, but cover all employees.

It is evident that the achievement of the purposes of the Retirement Act, previously described, warrant and require the inclusion under the Act of all of the employees of the carriers.

*Railway labor legislation.*—It would seem that the question of whether all employees may be included has already been answered, since, as previously indicated, Congress has, in the Transportation Act, 1920, and since, adopted labor legislation not restricted to employees engaged directly in interstate commerce. Nor has this legislation been questioned on that account. Title III of the Transportation Act, 1920 (C. 91, Sec. 304, 41 Stat. 470, U. S. C., Title 45, Sec. 135), established the Railroad Labor Board, with authority to decide disputes between all carriers and their employees generally.

That act made no reference to employees engaged in interstate or intrastate commerce, or any commerce.[28] It came before this Court in a suit brought by the Pennsylvania Railroad to enjoin the Board from rendering a decision in a dispute between the carrier and a union representing employees "engaged in shop work", the holding of the Court being that the rendering of a decision by the Board could not be enjoined. *Pennsylvania Railroad Co.* v. *United States Railroad Labor Board,* 261 U. S. 72; the question whether the Act could validly apply to disputes between the carrier and employees not directly engaged in interstate commerce was not raised.

Title III of the Transportation Act, 1920, was superseded in 1926 by the Railway Labor Act (c. 347, 44 Stat. 577, U. S. C., Title 45, Secs. 151–163). This Act, designed to protect the rights of railroad employees to bargain collectively and to achieve the solution by arbitration or mediation of disputes between carriers and employees, likewise was made expressly applicable to employees of interstate carriers generally (Sec. 1). The constitutionality of this act was attacked, but not on the ground of its applicability to all employees. *Texas & New Orleans R. R. Co.* v. *Brotherhood of Railway and Steamship Clerks,* 281 U. S. 548, *supra.* In sustaining the constitutionality of the provisions of

[28] Preceding acts, e. g., The Erdman Act of June 1, 1898, c. 370, 30 Stat. 424, and the Newlands Act of July 15, 1913, c. 6, 38 Stat. 103, applied only to employees engaged in train operation or train service.

the Act prohibiting employers from interfering with the rights of employees to elect their own representatives for the purpose of bargaining, this Court said (p. 570):

> We entertain no doubt of the constitutional authority of Congress to enact the prohibition. The power to regulate commerce is the power to enact "all appropriate legislation" for its "protection and advancement" (*The Daniel Ball*, 10 Wall. 557, 564); to adopt measures "to promote its growth and insure its safety" (*County of Mobile* v. *Kimball*, 102 U. S. 691, 696, 697); to "foster, protect, control, and restrain" (*Second Employers' Liability Cases*, 223 U. S. 1, 47). Exercising this authority, Congress may facilitate the amicable settlement of disputes which threaten the service of the necessary agencies of interstate transportation. In shaping its legislation to this end, Congress was entitled to take cognizance of actual conditions and to address itself to practicable measures.

It may be noted that this case involved the authority of the plaintiff brotherhood to represent the railway clerks in the employ of the defendant carrier, that is to say, some of the very employees claimed by respondents not to be subject to Congressional power.

The Railway Labor Act was substantially amended at the same time that the Retirement Act was passed, and, as amended, contains practically

the same definition of employees subject to the Act as does the Retirement Act. C. 691, 48 Stat. 1185.

In *Long Island Railroad Co.* v. *Department of Labor of the State of New York*, 256 N. Y. 498, the New York Court of Appeals held that a State law regulating hours of labor and wages of workmen engaged in the elimination of grade crossings could not lawfully apply to employees of interstate carriers, without regard to whether the employees were themselves engaged in interstate commerce. The Court took the view that the enactment of the Railway Labor Act by Congress evidenced an intention of Congress to exclude "any interference by any State in the field of wages of employees of interstate carriers."

*Practical considerations.*—There are practical considerations which render the decision in *The Employers' Liability Cases* inapplicable to a retirement and pension law. Under an employers' liability act regulating solely liability arising from accidents occurring at particular times, it is necessary to determine only whether a particular employee was engaged in interstate commerce or transportation at the instant of the accident. But under a retirement act, where employment for a period of years precedes each retirement, it would necessarily be exceedingly difficult as well as costly to administer a plan which required the keeping of records of the character of the employment of each employee from month to month, day to day, and

even hour to hour, showing employment in interstate and intrastate commerce.[29] And in addition, the likelihood would be that upon retirement the employee would find himself involved in costly litigation to determine whether during particular periods of his service he was engaged in interstate or intrastate activity. Obviously such a situation would defeat the purposes of the Act.[30]

Moreover, where particular employees shift from time to time between tasks involving intrastate and interstate commerce, the total amount of time spent by a particular employee in interstate commerce might often be too short to entitle him to an adequate annuity.

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[29] In this connection, Mr. Latimer states (R. 182): "Records of individual railway employee histories, * * * indicate a rapid change of employees from one job to another. Moreover, the necessity for flexible organization requires rapid shifts in the duties of those holding the same position. The provision for old age is essentially a long-time, saving process. In order to arrive at a satisfactory basis for computing costs and determining amounts of annuities, it is essential that there be some stable basis on which to make calculations. Any attempt, for pension purposes, to segregate groups of employees or time spent by individual employees on the basis of the classification employed in the affidavit of Dr. Parmelee, verified September 17, 1934, would be an almost impossible task and would involve expense which would probably exceed any benefit to be derived therefrom."

[30] Even under the Federal Employers' Liability Act there has been much litigation over the question whether the particular duties were or were not in interstate transportation. See Schoene & Watson, *Workmen's Compensation on Interstate Railways*, 47 Harvard Law Review, 389, 399, *et seq.*

That employees in the course of their careers often shift, or are transferred, from one position to another is a matter of common knowledge. Furthermore, as cases arising under the Employers' Liability Act indicate, in some positions an employee may at different moments shift from duties in interstate commerce to those in intrastate commerce and vice versa. See *Chicago and North Western Railway Company* v. *Bolle*, 284 U. S. 74, 76–77, and cases cited. Mr. Eddy stated by way of illustration that (R. 194):

> a railroad machinist may be working in the back shop today, in the engine house tomorrow, and attending a running repair on an interstate locomotive the day after. During a life service of thirty years or more, a member of the craft will be engaged in practically every occupation requiring the application of machinists' skill to railroad operation. * * *.

It is undoubtedly equally true that many employees in the clerical forces shift from time to time as between interstate and intrastate functions. These are not changes due to labor turnover, but shifts due to the advancement of employees, changes in organization, and fluctuations in the needs of the carriers. It should not be overlooked that with respect to each carrier, the employees are under the carrier's control, and, subject possibly to union agreements, may be required at any time to work in any position which the carrier may designate.

In the *Long Island Railroad Company* case, *supra*, the New York Court of Appeals, in holding that a State law regulating hours of labor and wages of workmen engaged in the elimination of grade crossings could not validly apply to employees of interstate carriers, said (p. 516):

> The work of a carrier is for most purposes a unit, and it would hardly be feasible to segregate work in interstate commerce or the employees engaged therein from other work and employees. Excessive hours of labor performed in intrastate work may diminish the efficiency of a worker, thereafter employed in interstate commerce. Difference in wages paid to men doing the same grade of work for the same employer and even at times shifted from one form of work to another may create labor unrest which will affect interstate commerce. Congress may, therefore, assume exclusive jurisdiction in such matters.

The practical situation requires that retirement legislation be applied to all employees of interstate carriers. As this Court said in *Texas & New Orleans Railroad Co.* v. *Brotherhood of Railway & Steamship Clerks, supra*, p. 570, in shaping its legislation Congress is entitled to take cognizance of actual conditions and to address itself to practicable measures.

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*Special categories of employees.*—Respondents point separately to three particular classes of em-

ployees, who they urge may not be covered by the Retirement Act: (1) employees engaged in miscellaneous activities such as the handling of investment accounts, securities, rents, and the sale of electric power; (2) employees engaged in the intrastate suburban service of the carriers; (3) as to two of respondents, employees engaged in coal mining. The contentions as to these employees clearly do not affect the validity of the Act as a whole. At most, the Act may be held to be not applicable to some or all of these limited classes of employees; or the separability clause (Section 14) may be applied to exclude them from the operation of the Act. It is submitted, however, that there is no basis for excluding these employees.

(1) *Miscellaneous activities.*—With respect to the first group, affidavits of five of the largest carriers (R. 124–130) were introduced, all substantially alike, so that one may be taken as typical. An official of the New York, New Haven & Hartford Railroad states (R. 124–125) that that carrier is engaged not only in the business of a common carrier but in addition is the owner of stocks ($108,000,000), bonds ($65,000,000), and other securities of other companies, as well as of real estate not used for transportation purposes ($8,000,000). Gross revenues are received by it from the sale of electricity to others ($960,000), rent of buildings ($120,000), dividends ($1,129,000), income from funded securities ($2,320,000) and unfunded

securities ($243,000), and other miscellaneous sources. A considerable number of the officers and employees of the company "are continuously engaged in duties in connection with the investment in, attention to, accounting and financing of, the investments and assets above referred to * * * while many other officers and employees * * * are largely engaged in such duties."

No intimation is given of the actual number of employees engaged in these functions and whether over a period of time any employees are exclusively engaged therein.[31] Even assuming that such employees are not to be regarded as railway employees along with all others, it is submitted that respondents have failed to make a full and sufficient showing such as would be required before the Court would hold the Act inapplicable or void as to those employees.

(2) *Intrastate suburban service.*—Four affidavits were introduced showing the extent and

[31] The records of the Interstate Commerce Commission indicate that railways reporting expenses for the maintenance of investment organizations in 1932 showed *total* expenses on this account of only $31,827. This sum is supposed to include all "directly assignable organization and administration expenses", which are incident to investment in leased and nonoperating physical property, and in stocks, bonds, or other securities. See Interstate Commerce Commission, *Statistics of Railways in the United States*, 1932, p. S–56; Interstate Commerce Commission, *Classification of Income Profit and Loss and General Balance Sheet Accounts for Steam Roads*, 1914, p. 23, Account No. 549.

character of the intrastate suburban service of four carriers (R. 118–124). The facts vary slightly in each case. The Illinois Central employs separate tracks and equipment, including electric trains, for its local suburban service, except that occasionally at night and in emergencies other trains are operated on some of the tracks (R. 119). Approximately 666 employees have duties exclusively devoted to this service, but some occasionally leave this service for some other service (R. 119). Whether interstate passengers travel in the suburban trains of the Illinois Central on through tickets is not indicated.

The Long Island Railroad has a total of 837 employees engaged in its local passenger commutation service (R. 120). A small fraction of its earnings in 1933 was from interstate passenger traffic (R. 124).[32] The Pennsylvania Railroad has 202 employees engaged in its local passenger commutation service (R. 121). Whether or not interstate passengers are carried in trains engaged in this service is not shown.

The New York Central has three intrastate branches devoted to passenger commutation service, in two of which 162 persons are employed (R.

[32] In *Transit Commission* v. *United States*, 284 U. S. 360, 369, it appeared that interstate traffic constituted approximately .16% of the gross revenue of the Long Island Railroad.

121–122). As to one of these, the affidavit states that "all of the passenger traffic * * * thereof *was* [*sic*] local and intrastate within the State of New York", this statement being supported, however, solely on the basis of the fact that in a single month, June 1934, no tickets were sold for transportation to destinations outside the State (*Ibid.*). With respect to the second branch, the passenger service performed thereon "was predominantly, if not entirely, local and intrastate" (*Ibid.*). On the third branch "to a considerable extent * * * a substantial amount of wholly intrastate passenger traffic is performed, the precise statistics of which are not readily available, * * *" (R. 123).

So far as appears, all of these lines are a part of the national transportation system and subject to Federal jurisdiction to the same extent as other lines of interstate carriers. *Transit Commission* v. *United States,* 284 U. S. 360. No basis is shown, therefore, for segregating the employees engaged upon such lines.

(3) *Coal mining.*—Two of respondents operate coal mines (R. 115–117). These mines, as stated by respondents, are operated for their own use and for their employees under the restrictions of Section 1 (8) of the Interstate Commerce Act, as amended. *Norfolk & Western Ry. Co.* v. *United States,* 287 U. S. 134.

## VI

### THE MEASUREMENT OF ANNUITIES BY REFERENCE TO SERVICE PERFORMED PRIOR TO THE PASSAGE OF THE ACT IS NOT ARBITRARY OR OTHERWISE UNLAWFUL

The amount of the annuity which an employee is entitled to receive upon retirement under the Retirement Act is determined by multiplying a graduated percentage of his average compensation [33] by the number of years of his service, not over thirty (Section 3). Respondents attack this provision insofar as periods of service rendered prior to the Act are considered in the computation of annuities, on the ground that it "arbitrarily and unlawfully operates only on past services and events" (R. 11). The court below sustained this contention of respondents, saying in part that to require respondents "to contribute huge sums of money to be devoted to the payment of pensions or annuities based upon services long since completed and fully paid for seems to me to take their property without due process of law" (R. 264).[34] This

[33] Average compensation is the average pay received during the employee's entire period of service, except that average pay received for all pay roll periods worked during the eight years prior to December 31, 1931, is to be taken as the average pay for the entire period of service rendered prior to the taking effect of the Act. No part of any compensation in excess of $300 per month is to be considered (Section 3).

[34] The court states in its opinion that upon the assumption of uniform retirement at 65 the gross annuities which will

ruling was the second of the two grounds on which the court below held the Act as a whole invalid.

The language just quoted from the lower court's opinion discloses that the court omitted to take account of the purpose of the annuity payments and misapprehended the role of prior service in determining the amounts of annuity payments. It has been shown that the pension is not at all an additional payment for past services "long since completed and fully paid for", but is an expenditure for a present and future benefit through improvement of the personnel of the carriers. As has been stated, one of the chief objectives of the retirement plan is to secure the retirement of superannuated employees. Experience has shown that unless some provision is made for their support employment officers hesitate to discharge elderly workers, and they are retained in the service at the expense of the efficiency of the organization and often at great cost. (*Supra*, pp. 40, 48.) If Congress is authorized to provide for the compulsory retirement and pensioning of superannuated workers, clearly the manner in which the

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be required to be paid to present employees of the carriers on account of service rendered prior to the enactment of the Act will amount to over $4,000,000,000 (R. 264). The court omitted to state that this sum would be payable over a period of some eighty years, and that the employees would contribute one-third: also that a substantial portion of that sum would have been paid by respondents by virtue of their existing pension plans had the Retirement Act not been passed (R. 211).

amount of annuities shall be determined rests in its sound discretion.

The fact that the carriers themselves have adopted length of service as a measure of their pensions, and that this has been the practically universal practice,[35] would seem to be conclusive proof of its reasonableness. Several other bases might have been used, each having some support in reason. Thus a uniform annuity for all pensioners, or an annuity in an amount adjusted to the needs of the individual employee, might be used; or the amount might be fixed solely by reference to the compensation at time of retirement. The method adopted in the Retirement Act—based both upon average compensation and length of service—seems the fairest to the employer and to the employee. The maximum annuity payable under the Act is only $1,440.00, and to receive this maximum the employee must have been in the service thirty years and have attained the age of 65, and must have been paid an average monthly compensation of $300 (Section 3).

It is true that with respect to those employees whose service periods antedate the passage of the

[35] From his analysis of existing pension plans in all industries, Mr. Latimer found that "in by far the largest number of plans * * * the pension is related to the period of the employee's service and his average pay during some specified period." Latimer, *Industrial Pension Systems*, Vol. 1, pp. 150–151. This is precisely the method adopted in the Retirement Act.

Act, the Act draws upon past facts for the calculation of the amount of annuities payable to them upon retirement. But present and future facts constitute the grounds and the occasion for the payment of the annuities. As stated by this court in *Cox* v. *Hart*, 260 U. S. 427, 435, where another act of Congress was attacked upon a ground similar to that urged here:

> The language in terms applies to one who at the time of enactment occupied a particular status, viz, the *status* of a person who has done the things enumerated. A statute is not made retroactive merely because it draws upon antecedent facts for its operation.

See also *Hawker* v. *New York*, 170 U. S. 189.

It should be noted that if all service prior to the Act is excluded in the computation of annuities, that is, if the computation of annuities were to commence only with service rendered subsequent to the Act, 25 or 30 years would have to elapse before annuities sufficiently adequate to provide old-age security could be earned. Since to compel the retirement of employees without adequate annuities would not only be unthinkable but would be inconsistent with the purposes of the Act, the effective operation of the Act would have to be postponed for a generation.

The payment of pensions, under State pension laws, has been several times sustained, although the

service periods of the pensioners in part antedated the laws, in the face of express constitutional prohibitions against the payment of additional compensation for services previously rendered and paid for. *State* v. *Love*, 89 Neb. 149; *Hammitt* v. *Gaynor*, 144 N. Y. Supp. 123, 127, affirmed in 165 App. Div. 909; *Wright* v. *Craig*, 195 N. Y. Supp. 391, affirmed in 234 N. Y. 548; *Carr* v. *Roesch*, 246 N. Y. Supp. 628, affirmed in 255 N. Y. 614; *Cobbs* v. *Home Insurance Co.*, 18 Ala. App. 206; *Whitehead* v. *Davie*, 189 Calif. 715; *De Wolf* v. *Bowley*, 355 Ill. 530; *Bowler* v. *Nagel*, 228 Mich. 434; *Byrd* v. *Dallas*, 6 S. W. (2d) 738; and *State* v. *Levitan*, 181 Wis. 326. In most of these cases the pension plans involved provided for measurement of annuities according to final compensation only and not years of service. However, the decisions plainly negative respondents' contention that a pension is added compensation for services previously rendered.

*Inclusion of prior service of reemployed persons.*—Respondents allege in their bill of complaint (R. 10), and the Court below found (R. 266), that there are something over a million persons not presently covered by the Act who formerly were employed in the railroad industry, and whose earlier service, if they should hereafter be reemployed, will be added to their subsequent service for the purpose of determining their pension rights.

Respondents contended below that a former employee with a long term of prior service might obtain employment for a short period and under the Act become eligible for a pension measured by all the years of his service.

Respondents' own testimony is that one carrier rarely employs the former employees of other carriers but selects only its own workers. Respondents' witness states that "it has been the prevailing practice of the carriers for many years, as forces are enlarged or as vacancies are filled, to give the preference to former employees of such individual carriers, and by reason of this practice, the deponent avers that no substantial or significant number of persons separated from the employ of any of the carriers", prior to the Act, "have been employed by other carriers, * * *" (R. 139; see also R. 50). Consequently, since the carriers ordinarily employ only their own former employees, it is distinctly within their control to prevent a former employee with a long period of service from returning for a short period of service only to be retired on pension. Furthermore, it is the practice of the carriers under the seniority rules, when men are laid off, to lay off first men with the shortest periods of service (R. 34, 139). Another rule common upon the railroads, which prohibits the hiring of men over 45 (R. 164), also makes it unlikely that a former employee will obtain employment less than 20 years before retirement age.

Furthermore, the fact that a man's period of service has been interrupted by a period of unemployment furnishes no reasonable justification for treating him, upon retirement, as though his service had only begun at the time of reemployment.

Under all the circumstances, in view of the policy of the Act to provide an adequate annuity upon retirement and of the fact that unless total years of service are included the annuity is not likely to be adequate, and in view of the fact that the abuse which respondents claim to foresee is largely theoretical, the inclusion by Congress of the prior service of persons formerly in carrier employ who became reemployed subsequent to the Act is not unreasonable.

*Contribution of employees now eligible for retirement.*—Respondents make a point also of the fact that in the case of persons already eligible to retire, they will have contributed little toward their own annuities. The Court below found that there are now in the employ of respondents not less than 12,696 employees, other than officials, who are 70 years of age or over, and who under the Act are required to retire forthwith (Finding 15, R. 268–269). The Court found that they will contribute a total of approximately $266,616.00 to the retirement fund but will receive in annuities not less than $9,500,000.00 the first year and not less than $78,000,000.00 to the termination of their annuities (*Ibid.*):

On the basis of what has already been said, the answer to respondents' contention based upon these facts is obvious. The retention of these employees aged 70 and over is injurious and costly to the service. Except for the Act, a number of them would be retained in the service. Their retirement is required by the Act in the interest of improving the service. That they will receive from the fund more than they will have contributed is not significant for all retired employees receive more than they contribute.

Furthermore, the evidence indicates that the 70-year-old men are to be found largely in the train and engine service in which the highest wages are paid (R. 32). The older employees also receive higher wages than the average (*Ibid.*). Consequently, it may be expected that in addition to the intangible benefits which may be expected to accrue to the carriers, substantial actual pay-roll savings will result through replacing the 70-year-old men with younger men at lower salaries.

## VII

### THE INCLUSION, AMONG THOSE ELIGIBLE FOR ANNUITIES, OF PERSONS WHO WERE IN SERVICE WITHIN A YEAR PRIOR TO THE ACT IS NOT UNREASONABLE AND IS WITHIN THE POWER OF CONGRESS UNDER THE COMMERCE CLAUSE

Section 1 (b) of the Act defines employees coming under the Act so as to include those who have been in the service of the carriers within one year before the adoption of the Act. Respondents contend that

the inclusion of such persons is beyond the power of Congress under the Commerce Clause and is unreasonable and arbitrary (R. 7–8).

The court below held that the provision of the Act including these employees was unconstitutional as being without reasonable relation to interstate commerce, but that it was separable from the remainder of the Act and did not affect the validity of the Act as a whole (Conclusions of Law, 3, 4, R. 273; R. 264).

The inclusion within the Act of the employees in question is clearly reasonable when viewed in the light of the facts of the railroad industry which were before Congress when the Act was framed. The purpose of Congress was to include a group of persons who, upon the passage of the Act, were in such relation to the industry as to be properly classed as employees, though they were not then receiving compensation. It is a practice of the industry to grant employees who have been furloughed so-called "seniority" or "prior reemployment rights", that is, the last employee removed from the pay roll is the first to be recalled to service when a vacancy occurs (R. 201). In many cases this is provided for in contracts between employee organizations and the carriers (R. 183). Such furloughed employees are generally regarded as employees and in many cases are permitted to continue as members of mutual benefit associations, to contribute to group-insurance systems, and to con-

tinue to use free passes over the lines of their employers as well as over the lines of other carriers (*Ibid.*). In addition, in order to fill unexpected vacancies in certain classes of employment railroads are necessarily dependent upon a substantial number of employees being available at each place of employment; such employees are usually referred to as "extra" or "stand-by" employees (R. 183, 201). They are subject to call at all times and hold themselves in readiness for railroad service in preference to securing other employment (R. 183.)

The period of time during which employees are listed as retaining their seniority rights or are continued on the call list varies with the different carriers (R. 183). Where no contract exists, names are taken off the lists irregularly, as soon as an employee is furloughed, or once every six months, or annually, or at infrequent or indefinite periods (*Ibid.*). "In any event, there is always a body of employees not actively engaged in railroad service who regard themselves, and for most purposes are regarded by the carriers, as employees, and who would ordinarily be reemployed" (R. 183). "For all practical purposes, these extra employees although not necessarily on the pay roll, are essential to the proper conduct of the railroad industry" (R. 201).

Some of the earlier drafts of the Act included among employees subject thereto those having "reemployment rights". S. 3231, Section 1 (b); H. R.

9596, Section 1 (b), 73d Cong., 2d Sess. The provisions of the bills referred to were criticized by Mr. Eastman, who stated in the Congressional hearings: "The employees so included are defined in terms of retention of the right to reinstatement. These rights vary widely as between carriers. Our investigation has already developed that fact." Hearings on S. 3231, p. 158. Further he said: "The definition of 'employee' includes * * * those 'subject to call for employment' or who retain 'rights of employment.' These phrases would invite all manner of controversy. . The practices of the carriers in furloughing employees and permitting retention of rights differ very widely." Hearings on H. R. 9596, p. 35. And: "In general, the language is such as to result in penalizing the employees of carriers which were most drastic in reducing employment and most hardboiled in cutting names from extra boards." Hearings on S. 3231, p. 158. As a result, and upon the recommendation of the Director of the Labor Relations Section of Mr. Eastman's staff, the one-year provision now contained in the Act was adopted as a substitute, the one-year period being taken as a reasonable approximation of the usual duration of reemployment rights (R. 183, 201–202).

Respondents will urge that, as to these employees, those who are in fact recalled to service subsequent to the Act would receive the benefits of the Act in any case and that on this account the

provision of the Act was unnecessary. However, for the very reason that upon reemployment these employees would become entitled to annuity rights, Congress may well have feared that the failure to include the furloughed and so-called stand-by employees might cause many of them not to be recalled (R. 183–184). The fact that upon reemployment, they would have accrued prior service credits might lead railroads, in order to reduce pension costs, to discriminate against them in favor of persons with lesser prior service.

The court below found that during the year prior to the approval of the Act more than 146,000 of respondents' employees, other than those removed by death, left the service and have not returned; that a large number of these are permanently separated from carrier service, 8,065 having been discharged for cause, 21,158 having voluntarily resigned or left the service to engage in other employments, 5,066 having retired on account of age or disability, 19,786 having been only temporarily employed, 167 having left because their positions were abolished, 5,512 having left because of consolidations of forces abolishing positions, 2,645 having been seasonal laborers, and 95 having completed their apprenticeship (Finding 17, R. 269).

The only evidence supporting this finding consists of an affidavit (with two supplements) summarizing the responses to questionnaires sent to officers of the respondents (R. 49–51, 58–59, 137–

138). The character of this evidence is not such as would warrant the Court in overriding the judgment of Congress. The inclusion of persons other than those coming directly within the *purpose* of the provision in question (e. g. other than furloughed and extra employees) is not a burden upon respondents unless those persons both (1) do not in the future return to the railroad service and (2) have accumulated substantial prior service rights. Except for the latter the retirement fund will not be burdened; and with respect to the former, as to such of the employees in question who will return to service, they will obtain their pension rights in any case. No showing is made with respect to the length of prior service of those who, it is claimed, have permanently left the service. And the mere expression of opinion by respondents' officials, without more, that a large number of employees have permanently left the service is not convincing. Respondents' officials were asked in effect to guess whether particular employees who left the service during the year prior to the Act would or would not return to the service in the future. It is noteworthy that of those who, it was asserted, probably will not return, 17,538, or more than one-fifth had been laid off on account of force reductions (R. 138). The assertion that such employees generally will not return in the future seems incredible. It may be noted that respondents themselves did not request any finding with respect to this group

(R. 269). The weakness of the assertion with respect to this group also reflects upon the reliability of the judgments expressed as to the remaining persons involved. A large group are reported as having resigned, but reasons for resignations are not given. In the existing economic conditions, particularly in the railroad industry (see *Earnings and Standard of Living of 1,000 Railway Employees During the Depression,* R. 219, et seq.), resignation by itself is not at all indicative of permanent departure from the service. When employment is not sufficiently steady to provide a minimum of sustenance, employees may resign in order to obtain less desirable, but steadier, work until conditions are improved. With respect to the only other large group, temporary employees whose work was completed, it may not be assumed, in the absence of evidence, that their prior service is sufficiently substantial to burden the retirement fund.

The provision of the Act in question is reasonably designed to describe a class of persons whose inclusion as employees is within the power of Congress. Faced with a difficult problem of definition, Congress *acting upon expert advice* chose a provision which seemed to it best calculated to include those persons who ought to be included. That some additional persons may have been included because of the impossibility of exact segregation is not fatal to the constitutionality of the provision.

## VIII

### NONE OF THE OTHER PROVISIONS OF THE ACT ATTACKED BY RESPONDENTS IS UNREASONABLE OR OTHERWISE UNLAWFUL

Several of the other provisions of the Act are attacked in the bill of complaint. They were not ruled upon by the lower court but are considered in this brief in view of the expressed intention of respondents to renew their contentions with respect to them.

#### 1. Payment of Annuities to Employees Who Shall Have Left the Service Prior to Retirement Age

Sec. 1 (b) defines an "employee" as "each person in the service of a carrier * * * who after the enactment hereof *shall have been* in such service." Sec. 3 provides that "each employee having attained the age of 65 years * * * shall be paid an annuity * * *". The Act thus contemplates that annuities shall be payable to employees at age 65, even though they do not continue in the service until that age. The amounts of annuities, as has been indicated, are determined, in any case, by the length of service. Respondents in their bill of complaint deny that the above construction of the Act is a proper one, but nevertheless assert that if the act is properly so construed it is unreasonable and arbitrary (R. 8).

It is clear from the language of Section 1 (b) and Section 3 that Congress deliberately provided for the payment of annuities commencing at the

retirement age, irrespective of whether the employee has continued in service until that age. The purpose of this provision and its relationship to an adequate retirement and pension system is obvious. One of the essential functions of such a system being to provide assurance to employees of old-age security, no real assurance of this kind is possible when pension rights may be lost at any time by loss of employment. In the absence of some provision such as that now being considered, employees might be laid off or discharged on the very eve of retirement and lose their pension rights (R. 186). Under such circumstances, the feeling of security, which it is the object of the Act to instill in the employees, could hardly be brought about. As stated by Mr. Latimer (R. 186):

> one of the most beneficial results which may come out of a system of retirement annuities, * * * is an enhancement of the feeling of security of the employees. Undoubtedly one of the most effective ways of reducing costs of production is to give the employees a feeling that their future is reasonably secure. If the threat that loss of jobs with the railways would mean loss of old-age income constantly hangs over the carrier employee's head, the feeling that old-age income is secure would largely disappear, and one of the greatest advantages of old-age insurance would be lost.

Under the provision of the Retirement Act the employee is assured that pension rights which have

accrued to him will not be lost. Such provision is reasonable, not because of benefits to employees after they have left the service but because it improves the morale of the employees while they are in the service. Here, again, Congress had the advantage of the views of industry. At the 1932 meeting of the United States Chamber of Commerce (*Employees' Retirement Annuities,* Chamber of Commerce of the United States, 1932, *supra,* p. 44), it was resolved in part that—

> A progressive step toward assuring the benefits of employee retirement annuities permits employees whose connection with an employer is terminated after a reasonable period of service to retain their annuity credits as a help toward provision for their old age.

It is interesting to note that a similar provision in a State law providing pensions for judges was recently upheld by the Supreme Court of the State of Illinois in the face of a constitutional prohibition against the payment of additional compensation after services are performed. *DeWolf* v. *Bowley,* 355 Ill. 530.

*Employees discharged for cause.*—Respondents object particularly (R. 8) that the provision of the Act in question does not differentiate between employees who have been discharged for cause and those whose separation from the service is due to other circumstances. Having in mind the purpose of this provision to provide definite assurance of

old-age security, there is little, if any, more reason for providing for the loss of accrued pension rights in case of discharge for cause than in case of discharge for any other reason. If, as has been shown, the assurance to the employees that pension rights, once earned, will not be lost is calculated to improve the morale of the employees, any proviso whereby pension rights would be lost by reason of discharge whether with or without cause would tend to defeat the purpose of the Act.

Furthermore, since there is not, and cannot be, any uniform standard of practice in the discharge of persons for cause, in fairness to employees and to insure uniformity in the application of the Act, any provison for loss of pension upon discharge for cause would probably require, in addition, some provison for official investigation of such discharges. The difficulty of administering such a provision, alone, would seem to justify the failure of Congress to provide any distinction between discharges for cause and for other reasons.

*Employees of carriers which cease operations.*— Respondents point also to the possibility that employees of carriers which cease operations will nevertheless receive pensions when they attain the age of 65. The court below found that 184 short-line railroads went out of existence during the past 13 years, and that since June 27, 1933, 25 more went out of existence (Finding 26, R. 271).

The court found further that the employees of all of these carriers would, under the Act, remain a charge upon the retirement fund (*Ibid.*). But the court was manifestly in error; the employees of carriers which ceased to exist before June 27, 1933, do not come under the Act, unless they are employed subsequently by a carrier subject to the Act. In the latter event, they fall in the same category as the 1,000,000 former carrier employees previously referred to.

The employees of carriers which ceased to operate subsequent to June 27, 1933 (which is one year prior to the passage of the Act), are clearly few in number. In 1932, a severe depression year, the number of miles of railroad of carriers which ceased operation was only 401 out of a total of 247,594 miles operated by all carriers. Interstate Commerce Commission, *Statistics of Railways*, 1932, pp. S–5, S–4. Furthermore, the pension rights of employees of carriers which ceased to operate during the year immediately preceding the passage of the Act are determined by their years of service. Thus, the charge upon the retirement fund for annuities for such employees will be negligible, and certainly not sufficient to affect the validity of the Act as a whole.

**2. Optional Retirement After Thirty Years of Service**

Under Section 3 of the Act, any employee after a service period of thirty years is entitled to

retire upon an annuity, the annuity in such case to be reduced by one-fifteenth for each year that the employee is less than 65 years of age at the time of the first annuity payment, unless the Board shall determine that the carrier has retired the employee because of physical or mental inability to continue in active service. The court below found that respondents have, in the aggregate, 100,000 employees between the ages of 51 and 65 who have had thirty years of service (Finding 21, R. 270). Adopting respondents' contention (R. 9), the court found that "it is to the interest of the service of plaintiffs, and is to the interest of the public that those such employees who are competent and efficient be retained in carrier service for the benefit of their skill and experience" (Finding 21, R. 270).

The provision for the reduction of the amounts of annuities in cases of employees less than 65 may be expected approximately to compensate for the greater life expectancy (and consequently for the greater period during which annuities are likely to be payable) of persons retiring under 65 as compared with those who retire at 65 or over; thus the provision in question imposes no greater burden on the retirement fund (R. 185).

The justification for this provision is that employees who have completed thirty years of service may find it necessary, and it may be in the interest

of the industry, for them to retire before age 65 (R. 203). Under the voluntary pension systems, retirement is sometimes permitted to employees before the fixed retirement age (*Ibid.*). The reduced amount of the annuity in the case of retirement before age 65 may be expected to discourage such retirements unless they are reasonably necessary, because the employee will wish to continue at work until 65 in order to obtain his full annuity. The full annuity payable under the Act is not great, the maximum being only $120 per month (R. 184).

There would, therefore, appear to be little basis for respondents' contention that the provision for the optional retirement before age 65 of employees with thirty years' service will deprive the industry of many efficient skillful workers. Clearly, the provision in question is not arbitrary and unreasonable so as to be unlawful.

**3. Inclusion of Employee Representatives Under the Act**

Section 1 (b) defines employees to include officers and other official representatives of employee organizations, who have performed service for a carrier and who are duly authorized to represent employees under and in accordance with the Railway Labor Act. Section 7 provides that such employee representatives shall have the option of becoming, or continuing to be, beneficiaries under the pro-

visions of the Act, except that they must pay both employee and carrier contributions.[36] Respondents attack the inclusion of employee representatives under the Act upon the claim that the average age of employee representatives is greater than the average age of carrier employees (thus, on the average, being nearer the retirement age), as a consequence of which it is alleged that the carriers will be compelled to pay a part of the costs of pensioning the employee representatives (R. 11). The court in its findings of fact refused to find that the inclusion of employee representatives "will" constitute a substantial burden on the fund, but found that it "may" constitute such a burden (*Ibid.*).

The evidence in the record is conflicting, and it is submitted that adduced by respondents and relied upon by the court below is too insubstantial to form the basis of a ruling against the validity of the provision of the Act in question. The only evidence adduced by respondents is contained in

[36] Special provision is made in Section 7 for the computation of the basic compensation of such employee representatives for the purpose of computing retirement annuities, but no question is raised with respect to this. It should be noted that Section 7 is drawn upon the assumption that employee representatives generally have rights to be reemployed by the carriers. The basic compensation of an employee representative for the purposes of Section 7 is fixed at "that compensation paid by the carrier for service rendered in the position to which the rights of such representative would entitle him * * *"

the affidavit of Mr. McClees (R. 149), that the average age of some 640 employee representatives whose age records were available was 51 years and 3 months; and the testimony of Mr. Parmelee (R. 45), that in 1932, two years before the Act was passed, the average age of respondents' employees was 42.99 years. Mr. Eddy, for petitioners, points out that when the Act took effect there were 167,000 less employees than in 1932, and that, in view of the practice in the industry in reducing forces to lay off employees in the lower age brackets, it is likely that the average age of all railway employees when the Act took effect was substantially higher than that stated by Mr. Parmelee (R. 194). Mr. Eddy points out, also, that the 640 employee representatives referred to by Mr. McClees represent but a small sample of all the employee representatives in the industry, the total number, full time and part time, being in excess of 10,000 (R. 195). There are not less than 1,500 full-time employee representatives (R. 11). Mr. Eddy states that in his judgment there is very little difference between the average age of employee representatives as a whole and the average age of all employees in the railroad industry (R. 195).

The fact that only those employee representatives are permitted to come under the Act who have formerly been railway employees indicates the purpose of the provision in question. It is a known fact that the principal employee organizations have

in practice, for many years, chosen to be represented exclusively by railway employees. Railway employees might be loath to surrender their rights under the Act in order to become employee representatives; and this would interfere with the proper functioning of the policies of the Railway Labor Act, the validity of which this Court sustained in *Texas & New Orleans Railroad Co.* v. *Brotherhood of Railway and Steamship Clerks*, 281 U. S. 548, *supra*. The power of Congress to avoid conflict between the policies of the two Acts, even if at some cost to the industry, would seem clear. It is pertinent to note in this connection that under the voluntary pension systems of the railroads, absence from active service on account of engagement in employee organization work is not regarded by many roads as constituting a break in the continuity of service such as to make an employee ineligible for a pension; and some roads authorize inclusion in the employee's period of service, for pension purposes, all time spent by him in employee organization service (R. 192).

**4. The So-called "Pooling" of the Carriers' "Funds and Affairs"**

Because the Act provides (Secs. 5, 8) for the payment of all contributions into a common fund; and because amounts of annuities are made to depend on the service periods of the employees, time spent in the service of any carrier subject to the

Act being made a part of the employee's service period (Sec. 1 (f)), respondents contend that there is an improper "mingling" and "pooling" of their "affairs and funds" and the service periods of their employees (R. 10).

There can be no objection to the mere establishment of a common fund from which annuities are to be paid. Respondents' objection is, rather, that the Act prescribes an improper measure for determining carrier contributions to the fund. Carrier contributions are in effect made proportionate to their pay rolls (Sec. 5).

Insofar as it is the purpose of the Act to promote efficiency and safety in interstate transportation, it is concerned not with individual carriers but with railroad transportation as a whole. That Congress may regulate the railroads with an eye to improvement and development of railway service as a whole has been shown. Where, as is the case with interstate carriers in this country, common facilities are used, and through routes exist, interaction among the carriers is bound to exist. To the extent that any link in the transportation chain may be lacking in efficiency, the transportation system as a whole is affected.

Since the railroads (as well as the public) have a common interest in the efficient performance of the transportation system as a whole, it is proper and necessary to require them to contribute to the

cost of the plan which is designed to that end, without regard to the distribution among them of superannuated employees at the present time and regardless of differences in age classifications or service periods of their particular employees.

The pooling principle is desirable for the additional reason that there are a great many small carriers, the number of employees of which is too small to permit a separate retirement plan for each carrier (R. 204). In an industry-wide system, any attempt, in determining carrier contributions, to give particular consideration to differences in age classification and service periods of employees would involve great administrative difficulties and would unduly increase costs of administration (R. 188).

*The evidence.*—The fact is, however, that, despite respondents' assertion to the contrary, there is strong evidence of the absence of any substantial differences between the age classifications and service periods of the employees of the different carriers. A study made among the employees of seven large carriers, well distributed geographically and not specially selected, shows (R. 189) a remarkable tendency to uniformity in the "most probable" age of entry into service of their employees, the "most probable" age upon completion of thirty years' service, also in the ages at which the greatest number of employees entered the service, and com-

pleted thirty years of service. From this study, Mr. Latimer concluded that (R. 189):

> in the long run there will be no appreciable difference in costs as between these carriers and I know of no reason to suppose that the employment policies of other carriers will not be reasonably consistent with the policies of the seven roads considered in the study.

He had pointed out earlier (R. 188) that the employment conditions of many carriers have been given a considerable degree of uniformity by the influence of national employee organizations.

It may be noted that the lower court declined to make a finding, requested by respondents, that there is a wide variance among the different carriers in age classifications of their employees, and in respect to the past service periods of their respective employees (R. 271).

Respondents showed, and the court found (Finding 24, R. 270–271) that the employees now over 70 years of age who are required to retire forthwith are unevenly distributed among respondents and that some of respondents who have no such employees will nevertheless, in effect, be required to contribute toward their annuities. However, as Mr. Latimer points out (R. 188), the fact that there is at the present time in the service of the carriers some variation in numbers of persons who are over retirement age is no criterion of ultimate cost, and the cost differentials which

are involved are negligible as compared with the total cost.

*The decisions.*—The legality of the pooling principle, when reasonably applied, is well settled. In *Mountain Timber Company* v. *Washington*, 243 U. S. 219, employers were required to make contributions on the basis of pay rolls to a State workmen's compensation fund, the contributions of the employers being segregated according to industries. It was contended that the effect of the requirement was to make some employers pay for the accidents occurring in the plants of other employers. Answering this contention, this Court said (p. 244):

> In short, it cannot be deemed arbitrary or unreasonable for the State, instead of imposing upon the particular employer entire responsibility for losses occurring in his own plan or work, to impose the burden *upon the industry* * * *. (Italics supplied.)

The principles of pooling were extensively considered by the Court, and much that the Court said in its opinion supports the provisions of the Retirement Act. The *Mountain Timber* case was followed in *Thornton* v. *Duffy*, 254 U. S. 361.

In *Noble State Bank* v. *Haskell*, 219 U. S. 104, this Court upheld a statute which required banks to contribute a uniform percentage of their deposits to a State guarantee fund for the purpose

of making good losses to depositors of any of the banks which might become insolvent.

In *New England Divisions Case,* 261 U. S. 184, the Court held that it was proper for the Interstate Commerce Commission, in prescribing the division of joint rates between groups of carriers to give consideration to the financial needs of a weaker group, in order to maintain the latter in effective operation as part of the national transportation system.

In *Dayton-Goose Creek Railway Company* v. *United States,* 263 U. S. 456, the Court upheld the provision of the Transportation Act, 1920, requiring carriers to contribute one-half of their "excess earnings" to a revolving fund to be used by the Interstate Commerce Commission, "in furtherance of the public interest in railway transportation", for making loans to carriers to meet capital expenditures and to refund mature securities, or for purchasing equipment and facilities and leasing them to the carriers.

In *Atlantic Coast Line Railroad Company* v. *Riverside Mills,* 219 U. S. 186, this Court upheld the validity of the Carmack amendment to the Interstate Commerce Act which provided that the initial carrier should be liable to the consignor for the loss of goods contracted to be delivered over connecting lines. The carrier argued that this was imposing liability without fault, and required it to pay for losses occurring on the lines of other car-

riers. In sustaining the amendment, the court referred, among other things, to the right of reimbursement from the carrier responsible for the loss, but added (p. 205):

> that there is some chance that this right of recoupment may not be always effective may be conceded without invalidating the regulation.

The conclusion is well warranted that the so-called pooling provisions of the Retirement Act are reasonable and valid.

## IX

### THE RETIREMENT ACT DOES NOT INTERFERE WITH THE LIBERTY OF THE CARRIERS TO CONTRACT WITH THEIR EMPLOYEES WITH REFERENCE TO WAGES

Respondents allege in substance (R. 8–9) that the effect of the Retirement Act is to compel them to pay to their employees wages in addition to those agreed upon. The contention that on this account respondents are deprived of their liberty of contract and of their property without due process of law may be dealt with summarily.

Respondents in the court below relied upon the case of *Adkins* v. *Children's Hospital*, 261 U. S. 525, holding invalid a minimum wage law applicable to the District of Columbia. It is clear that the Retirement Act does not either directly or indirectly fix the amounts of wages to be paid by respondents. Just as in the case of a statute regu-

lating hours of labor (see *Bunting* v. *State of Oregon*, 243 U. S. 426; cf. *Wilson* v. *New*, 243 U. S. 332), the Retirement Act leaves the respondents free to bargain with their employees with respect to amounts of wages to be paid under the changed circumstances brought about by the Act. It is reasonable to infer that the new law will be advanced by the carriers in the negotiation of future wage agreements.

In any event, with respect to any claim of impairment of contracts already made, it is well settled that contracts between private individuals "must be understood as made in reference to the possible exercise of the rightful authority of the government, and no obligation of a contract can extend to the defeat of legitimate government authority." *Louisville & Nashville Railroad Co.* v. *Mottley*, 219 U. S. 467, 482, quoting from *Knox* v. *Lee*, 12 Wall. 457, 551. See also *Philadelphia, Baltimore & Washington Railroad Company* v. *Schubert*, 224 U. S. 603, 613–614; *New York* v. *United States*, 257 U. S. 591, 600–601; *Highland* v. *Russell Car Company*, 279 U. S. 253, 261; *Home Building & Loan Association* v. *Blaisdell*, 290 U. S. 398, 427–435.

## X

### ENACTMENT OF THE RETIREMENT ACT AT THIS TIME IS NOT UNREASONABLE BY REASON OF THE PRESENT FINANCIAL CONDITION OF THE CARRIERS

Respondents devote a substantial portion of their bill of complaint to allegations with respect to the

financial condition of the carriers, for the purpose of showing "the arbitrary nature of the Act under existing circumstances" (R. 11–13). At the request of respondents, the trial court made findings of fact with respect to the number of miles of railroad in the hands of receivers or trustees in bankruptcy, the earnings of Class I carriers during the years 1932 and 1933 and the first six months of 1934, and the composite rate of return earned by Class I carriers on their investments in the years 1932 and 1933 (Finding 29, R. 272).

The financial condition of the carriers at the time of the passage of the Act was a matter of common knowledge. Many carriers were, and still are, in straitened circumstances. Through the enactment of the Emergency Transportation Act of 1933, *supra*, Congress undertook to provide ways and means of improving their condition. Through the Reconstruction Finance Corporation Act (c. 8, 47 Stat. 5), Congress made provision for the lending of money to the railroads. That Congress was fully aware of the facts upon which respondents rely is, therefore, evident. That those facts were taken into consideration in the drafting of the Retirement Act is evidenced by the following statement contained in the report of the Senate Committee, *supra* (p. 4):

> The substitute bill aims at this time and during the 4 years' experience period to impose the least possible burden on the railroads and the employees. It proposes to

meet current obligations in the payment of annuities to employees who shall retire under those provisions from current contributions during such experience period.

No case has been found in which a regulation (other than rate regulation), otherwise valid, was held invalid because of the complaint that the plaintiff could not bear the cost. In any event, respondents' reliance upon conditions during the depression years is misleading. They are seeking to induce the Court to hold invalid, on the basis of conditions during a temporary period, a statute intended to apply indefinitely in the future. Respondents will be the last to assert that the railroad industry is a dying industry. It cannot matter that the earnings of the carriers during the past two or three years have been low, unless it is reasonable to assume that the years in question are typical of those during which the Act will apply. This Court will not assume that the economic conditions of the recent past are here to stay. It is common knowledge, also, that with improvement in economic conditions net revenues of the railroads tend to improve rapidly, due to the fact that great quantities of additional traffic can be handled with comparatively little increase of facilities

One of respondents' officials described in some detail the operating economies which have been introduced by the carriers since 1929, from which he concludes that transportation by railroad in the

United States is now being conducted more efficiently (i. e., at a lower unit cost) than ever before (R. 73–75). He stated in part that (R. 74):

> In maintaining the stability of the operating ratio [of expenses to revenues] during the past four years of economic depression, the carriers reduced operating expenses by $575,000,000 in 1930, by an additional $708,000,000 in 1931, by an additional $820,000,000 in 1932, and still further by $154,000,000 in 1933. The reduction in 1933, as compared with 1929, amounted to $2,257,000,000, or 50.1%. This compared with a 50.7% decline in revenues.

Mr. Eastman stated (R. 156):

> A marked revival in general business would do more than anything else to help the railroads, and they would profit very quickly from such a revival, because they now have their affairs in such shape that they can operate more cheaply than they did in 1929.

There is no reason to believe, therefore, that the carriers will not be able, in normal years, to pay the costs of the Retirement Act. When it is considered that the employees (and surely their financial condition at the present time is even more unfavorable than that of the carriers)[37] have will-

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[37] See Goodrich, United States Department of Labor, *Earnings and Standard of Living of 1,000 Railway Employees during the Depression*, 1934, R. 219 et seq.

ingly accepted the requirement that they contribute one-half the sum to be paid by the carriers, amounting to approximately $30,000,000 in employee contributions during the first year, it is difficult to conclude that the carriers cannot make their contributions.

It must be remembered that the Retirement Act will undoubtedly produce actual savings in pay rolls and may be expected to improve efficiency in numerous other ways (*supra*, pp. 70–72), so that it may not be assumed that the expenditures required to be paid under the Act, even at the outset, represent the net cost of the Act to the carriers. Furthermore, there is reason to believe that the Retirement Act may have some effect in helping to attain economies contemplated by the Emergency Transportation Act of 1933,[28] which otherwise it might not be possible to accomplish. In this connection, Mr. Eastman, although he believed that the adoption of the Act "could well be deferred", states that (R. 161–162):

> The Act is sound in general principle, and it will not be so much of a burden upon the railroads as they would have the Court be-

[28] See the long list of possible economies through coordination of carrier operations contemplated by the Emergency Act, referred to in the testimony of Mr. Eastman in hearings on the Emergency Act, and quoted in the House Committee report on that Act (No. 193, 73d Cong., 1st Sess., p. 10).

lieve. The retirement of superannuated employees through this Act—and there are many such employees in the railroad world—will give opportunities for younger men and more efficient men, *and it will also make it easier to obtain economies in operation which are quite possible of accomplishment.* (Italics supplied.)"

In view of the fact that the greater part of all operating expenses of carriers is devoted to the payment of wages (Annual Report, Interstate Commerce Commission, 1933, p. 92), the introduction of further economies through coordination of carrier operations, as contemplated by the Transportation Act of 1933, must be largely at the expense of employees through elimination of positions. However, in view of the serious unemployment situation in the industry (R. 204), Section 7 (b) of the Emergency Act [39] expressly forbids the wholesale discharge of employees in the course of the elimination of unnecessary operations or the coordination of functions. The retirement of superannuated workers will permit carriers to transfer to their places employees whose positions

[39] Section 7 (b) is as follows: The number of employees in the service of a carrier shall not be reduced by reason of any action taken pursuant to the authority of this title below the number as shown by the pay rolls of employees in service during the month of May 1933, after deducting the number who have been removed from the pay rolls after the effective date of this act by reason of death, normal retire-

it is desired to abolish. In this way coordination can proceed farther than would otherwise be possible (R. 205).

In view of all of the factors confronting and considered by Congress when the Retirement Act was adopted, it cannot reasonably be said that the Act—whether considered alone or as a part of the general plan to rehabilitate the railway industry—is an undue or arbitrary burden placed upon the carriers under present conditions. The language of the Court in *Northern Securities Co.* v. *United States,* 193 U. S. 197, 351–352, is pertinent here:

> But even if the Court shared the gloomy forebodings in which the defendants indulge, it could not refuse to respect the action of the legislative branch of the Government if what it has done is within the limits of its constitutional power. The suggestions of disaster to business have, we apprehend, their origin in the zeal of parties who are opposed to the policy underlying the Act of Congress or are interested in the result of this particular case; at any rate, the suggestions imply that the Court may and ought to refuse the enforcement of the provisions

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ments, or resignation, but not more in any one year than 5 per centum of said number in service during May 1933; nor shall any employee in such service be deprived of employment such as he had during said month of May, or be in a worse position with respect to his compensation for such employment, by reason of any action taken pursuant to the authority conferred by this title.

of the Act if, in its judgment, Congress was not wise in prescribing as a rule by which the conduct of interstate and international commerce is to be governed, that every combination, whatever its form, in restraint of such commerce and the monopolizing or attempting to monopolize such commerce shall be illegal. These, plainly, are questions as to the policy of legislation which belong to another department, and this Court has no function to supervise such legislation from the standpoint of wisdom or policy.

CONCLUSION

It is apparent that the retirement and annuity system embodied in the Act is not a hastily concocted device but is rather the product of many years of experience with industrial and governmental retirement and pension plans. There is little conflict in the record. The proof is clear that the system established by the Act is calculated to promote efficiency, economy, and safety in interstate transportation. This being, as well, the essential intent of the Act, there can be no question of the power of Congress under the commerce clause of the Constitution to adopt it. Since Congress has power to improve the national transportation system as a whole, it was clearly authorized to include under the Act all of the employees of the carriers. With respect to the remaining provisions of the Act which were attacked by re-

spondents, it becomes evident as respondents' contentions are examined that they are directed largely at the wisdom of the particular provisions adopted by Congress. There has been shown to be a substantial basis for each of them; viewed together as parts of a unified whole, each of them would seem to be reasonably adapted, if not essential, to the establishment of a sound and adequate retirement and pension system.

That Congress might have selected other provisions more to respondents' liking does not affect the validity either of the Act as a whole or of any of its provisions. As this Court said in *Chicago, Burlington & Quincy Railroad Co.* v. *McGuire*, 219 U. S. 549, 569:

> The scope of judicial inquiry in deciding the question of *power* is not to be confused with the scope of legislative consideration in dealing with the matter of *policy*. Whether the enactment is wise or unwise, whether it is based on sound economic theory, whether it is the best means to achieve the desired result, whether, in short, the legislative discretion within its prescribed limits should be exercised in a particular manner, are matters for the judgment of the legislature, and the earnest conflict of serious opinion does not suffice to bring them within the range of judicial cognizance.

It is respectfully submitted that the decree below should be reversed and the cause ordered remanded

to the trial court, with directions to dismiss the bill of complaint.

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# APPENDIX

The Railroad Retirement Act of June 27, 1934, c. 868, 48 Stat. 1283, provides as follows:

## AN ACT

To provide a retirement system for railroad employees, to provide unemployment relief, and for other purposes.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,*

### DEFINITIONS

SECTION 1. That as used in this Act—

(a) The term "carrier" includes any express company, sleeping-car company, carrier by railroad, subject to the Interstate Commerce Act, and any company which is directly or indirectly owned or controlled by or under common control with any carrier by railroad and which operates any equipment or facilities or performs any service (other than trucking service) in connection with the transportation of passengers or property or the receipt, delivery, elevation, transfer in transit, refrigeration or icing storage, and handling of property transported by railroad, and any receiver, trustee, or other individual or body, judicial or otherwise, when in the possession of the business

of any such "carrier": *Provided, however,* That the term "carrier" shall not include any street, interurban, or suburban electric railway, unless such railway is operating as a part of a general steam-railroad system of transportation, but shall not exclude any part of the general steam-railroad system of transportation now or hereafter operated by any other motive power. The Interstate Commerce Commission is hereby authorized and directed upon request of the Board or upon complaint of any party interested to determine after hearing whether any line operated by electric power falls within the terms of this proviso.

(b) The term "employee" means each person in the service of a carrier, subject to its continuing authority to supervise and direct the manner of rendition of his service, who has been in such service within one year before the enactment hereof, or who after the enactment hereof shall have been in such service. The term "employee" also includes each officer or other official representative of an "employee organization" herein called "representative", who has performed service for a carrier, who is duly designated and authorized to represent employees under and in accordance with the Railway Labor Act, and who, during, or following employment by a carrier, is engaged in such representative service in behalf of such employees.

(c) The term "Board" means the Railroad Retirement Board hereby created.

(d) The term "annuity" means regular payments at the end of each completed month during retirement, ceasing at death or at resumption of compensated service.

(e) The term "service" means the employment relation between an employee and a carrier whether before or after the enactment hereof.

(f) The term "service period" means the total service of an employee for one or more carriers whether or not continuously performed, and includes as one month every calendar month during which the employee has been paid compensation by a carrier and includes as one year every twelve such months. An ultimate fraction of six months or more shall be computed as one year.

(g) The term "retirement" means the status of cessation of compensated service with the right to receive an annuity.

(h) The term "age" means age at the latest attained birthday.

(i) The term "carrier contribution" means the payment to be made by each carrier.

(j) The term "employee contribution" means the payment to be made by each employee.

(k) The term "voluntary contribution" means the payment made by an employee equal to the total of both the employee and the carrier contribution.

(l) The term "effective date" means the 1st day of the second month after the taking effect of this Act.

(m) The term "Railroad Retirement Act" means and may be used in citing this Act and subsequent amendments thereto.

PURPOSES

SEC. 2. (a) For the purpose of providing adequately for the satisfactory retirement of aged employees and promoting efficiency and safety in

interstate transportation, and to make possible greater employmen opportunity and more rapid advancement of employees in the service of carriers, there is hereby established a railroad retirement system; and it is made the duty of all carriers and employees subject to this Act to perform and fulfill the obligations imposed thereby. This Act shall be administered and construed with the intent and to the purpose of providing the greatest practicable amount of relief from unemployment and the greatest possible use of resources available for said purpose and for the payment of annuities for the relief of superannuated employees.

SPECIAL REPORT

(b) Not later than four years from the effective date, the Board, in a special report to the President of the United States to be submitted to Congress, shall make specific recommendations for such changes in the retirement system hereby created as shall assure the adequacy and permanency of said retirement system on the basis of its experience and all information and experience then available. For this purpose the Board shall from time to time make such investigations and actuarial studies as shall provide the fullest information practicable for such report and recommendations.

ANNUITIES

SEC. 3. Each employee having attained the age of sixty-five years, or having completed a service period of thirty years, shall be paid an annuity, to begin on a date specified in a written application, which date shall not be more than sixty days before

the making of the application. No annuity shall begin less than six months after the effective date. Such annuity shall be based upon the service period of the employee and shall be the sum of the amounts determined by multiplying the number of years of service, not exceeding thirty years, by the following percentages of the monthly compensation: 2 per centum of the first $50; 1½ per centum of the next $100; and 1 per centum of the compensation in excess of $150. The "monthly compensation" shall be the average of the monthly compensation paid to the employee by the carrier, except that where applicable for service before the effective date the monthly compensation shall be the average of the monthly compensation for all pay-roll periods for which the employee has received compensation from any carrier out of eight consecutive calendar years of such services ending December 31, 1931. No part of any monthly compensation in excess of $300 shall be recognized in determining any annuity for any employee contribution. The annuity shall be reduced by one-fifteenth of such annuity for each year the employee is less than sixty-five years of age at the time of the first annuity payment. No such reduction shall be made if the Board shall determine that the carrier has retired the employee because of physical or mental inability to continue in active service. Upon death of an employee before or after retirement an amount, equal at his death to a computation, with interest at 3 per centum compounded annually, of the accumulation from his payments, less any annuity payments received by him, shall be paid as he may have designated or to his legal

representative. Any employee who upon retirement shall be entitled to an annuity with a value determined by the Board of less than $300 shall be paid such value in a lump sum.

### Retirement

Sec. 4. Retirement shall be compulsory upon employees who, on the effective date, have attained or thereafter shall attain the age of sixty-five years. The carrier and the employee may, by an agreement in writing filed with the Board, extend the time for retirement as to such employee for one year and for successive periods of one year each, but not beyond the age of seventy years. Until five years from the effective date, the compulsory retirement shall not apply to an employee who from and after the effective date occupies an official position in the service of a carrier.

### Contribution

Sec. 5. Each employee shall pay an employee contribution in a percentage upon his compensation. Each carrier shall pay a carrier contribution equal to twice the contributions of each employee of such carrier. The employee compensation shall be the compensation for service paid to such employee by the carrier excluding compensation in excess of $300 per month. The contribution percentage shall be determined by the Board from time to time, and shall be such as to produce from the combined employee and carrier contributions, with a reasonable margin for contingencies, the amount necessary to pay the annuities, other disbursements and the expenses becoming payable from

time to time. Until the Board shall determine on a different percentage the employee contribution percentage shall be 2 per centum. Employee contributions shall be deducted by the carrier from the compensation of its employees and shall be paid by the carrier, together with the carrier contributions, into the Treasury of the United States quarterly or at such other times as ordered by the Board.

EXISTING PENSION SYSTEMS

SEC. 6. The Board shall have the power to provide by appropriate rules and regulations for substituting the provisions for annuities and other benefits to employees under this Act, for any obligation for prior service or for any existing provisions for the voluntary payment of pensions to employees subject to this Act by a carrier or any employees subject to this Act, so as to relieve such carrier from its obligations for age retirement benefits under its existing pension systems and to transfer such obligations to the retirement system herein established. If the fulfillment of any such transferred obligation shall require additional contributions or larger payments than would otherwise be required under the provisions of this Act, then such additional contributions shall be made by the carrier originally responsible for the creation of such obligation or for the excess amount of such payments over those which would be required under the provisions of this Act. In the event that the Board is unable to make satisfactory arrangements with any carrier for the substitution of the provisions under this Act for its existing pension system, then, and in that event, the provisions of

this Act shall be applied to said carrier and its employees without regard to any conflict or duplication in the operation of such an existing pension system and the operation and effect of the provisions of this Act: Provided, That the Board, at its option, shall have power, in lieu of the foregoing provisions of this section, to order that all former employees of carriers, who prior to the effective date have become separated from the service at the age of seventy years or over and who may or may not be receiving age retirement benefits, shall be entitled to the benefits of this Act.

EMPLOYEE REPRESENTATIVES

SEC. 7. Any representative of an employee organization who is included within the definition of "employee" in paragraph (b), section 1, of this Act shall have the option, but, shall not be required to continue or to become a beneficiary under the provisions of this Act. If he shall elect to continue or to become such a beneficiary he shall pay all voluntary contributions.

For the purposes of this section the requirements of section 4 of this Act shall not apply. Service rendered to an employee organization shall be included in computing the total service period of such representative.

For such representative who shall elect to become a beneficiary under this Act, the basic compensation upon which contributions shall be made and benefits calculated shall be that compensation paid by the carrier for service rendered in the position to which the rights of such representative would entitle him for the period defined in section

3 of this Act: Provided, That if no definite and specific rights obtain, the average compensation paid to the four employees whose last date of entry in the service is nearest the date of entry in the service of the same carrier by such representative, shall be his basic compensation to be determined for the period defined in section 3 of this Act. When a question arises as to rights under this provision the Board shall investigate and determine rights of such representative.

For such representative who elects to continue as a beneficiary under the provisions of this Act, his basic compensation shall be the average monthly compensation paid to him by the carrier during the last twelve months of active service with such carrier.

RETIREMENT FUND

SEC. 8. All moneys paid into the Treasury under the provisions of this Act, all interest, and other receipts, and all refunds of moneys paid out under this Act shall constitute and be kept in a separate fund in the Treasury to be known as the "railroad retirement fund." At the request and direction of the Board, the Treasurer of the United States, with the approval of the Secretary of the Treasury, is authorized to invest such funds as are not immediately required for disbursements in interest-bearing bonds, notes, or other obligations of the United States, and to collect the principal and interest of such securities and to sell and dispose of the same as in the judgment of the Board shall be in the interest of said fund. There is hereby appropriated such sums not in excess of the

amounts in said fund as may be necessary to pay all annuities, other disbursements, and the expenses of administration of this Act.

RETIREMENT BOARD

SEC. 9 (a) PERSONNEL.—There is hereby established as an independent agency in the executive branch of the Government a Railroad Retirement Board, to be composed of three members appointed by the President, by and with the advice and consent of the Senate. Each member shall hold office for a term of five years, except that any member appointed to fill a vacancy occurring prior to the expiration of the term for which his predecessor was appointed, shall be appointed for the remainder of the term and the terms of office of the members first taking office after the date of enactment of this Act shall expire, as designated by the President, one at the end of two years, one at the end of three years, and one at the end of four years, after the date of enactment of this Act. One member shall be appointed from recommendations made by representatives of the employees and one member shall be appointed from recommendations made by representatives of the carriers, in both cases as the President shall direct, so as to provide representation on the Board satisfactory to the largest number, respectively, of employees and carriers concerned. One member, who shall be the chairman of the Board, shall be appointed initially, for a term of two years, without recommendation by either carriers or employees and shall not be in the employment of or be pecuniarily or otherwise interested in any carrier or organization of em-

ployees. Vacancies in the Board shall not impair the powers nor affect the duties of the Board nor of the remaining members of the Board of whom a majority of those in office shall constitute a quorum for the transaction of business. Each of said members shall receive a salary of $10,000 per year, together with necessary traveling expenses and subsistence expenses, or per diem allowance in lieu thereof, while away from the principal office of the Board on duties required by this Act. The members and employees of the Board shall be included as employees under this Act and together with employees receiving annuities shall be furnished free transportation in the same manner as such transportation is furnished to employees.

(b) DUTIES.—The Board shall have and exercise all the duties and powers necessary to administer this Act. The Board shall receive and take such steps and institute and prosecute such proceedings and actions as may be necessary to enforce the payments and obligations required under the Act, make and certify awards and payments, and account for all moneys and funds necessary thereto. The Board may require such advances upon the payments of carriers as necessary to put this Act into operation. The Board shall establish and promulgate rules and regulations and provide for the adjustment of all controversial matters, with power as a Board or through any member or subordinate designated therefor, to require and compel the attendance of witnesses, administer oaths, take testimony, and make all necessary investigations in any matter involving annuities or other payments, and shall maintain such offices, provide

such equipment, furnishings, supplies, services, and facilities and employ such persons and provide for their compensation and expenses, as may be necessary to the proper discharge of its functions. All rules, regulations, or decisions of the Board shall require the approval of at least two members and shall be entered upon the records of the Board and shall be a public record. The Board shall gather, keep, compile, and publish in convenient form such records and data as may be necessary, and at intervals of not more than two years shall cause to be made actuarial surveys and analyses, to determine from time to time the payments to be required to provide for all annuities, other disbursements and expenses, and to assure proper administration and the adequacy and permanency of the retirement system hereby established. The Board shall have power to require all carriers and employees and any officer, board, commission, or other agency of the United States to furnish such information and records as shall be necessary for the administration of this Act. The Board shall make an annual report to the President of the United States to be submitted to Congress. Witnesses summoned before the Board shall be paid the same fees and mileage that are paid witnesses in the courts of the United States.

COURT JURISDICTION

SEC. 10. The several district courts of the United States and the Supreme Court of the District of Columbia shall have jurisdiction to entertain an application and to grant appropriate relief in the following cases which may arise under the provisions of this Act:

(a) An application by the Board to compel an employee or other person residing within the jurisdiction of said court, or a carrier subject to service of process within said jurisdiction, to comply with any obligations imposed on said employee, other person, or carrier under the provisions of this Act.

(b) An application by an employee or carrier to the Supreme Court of the District of Columbia or to the district court of any district wherein the Board maintains an office or has designated an agent authorized to accept service in its behalf, to compel the Board to set aside an action or decision claimed to be in violation of a legally enforceable right of the applicant, or to take an action, or to make a decision necessary for the enforcement of a legal right of the applicant, when the applicant shall establish his right to a judicial review upon the jurisdictional ground that, unless he is granted a judicial review of the action or decision, or failure of the Board to act or to decide, of which he complains, he will be deprived of a constitutional right to obtain a judicial determination of his alleged right.

(c) The jurisdiction herein specifically conferred upon the said Federal courts shall not be held exclusive of any jurisdiction otherwise possessed by said courts to entertain actions at law or suits in equity in aid of the enforcement of rights or obligations arising under the provisions of this Act.

EXEMPTION

SEC. 11. No annuity or death payment shall be assignable or be subject to any tax or to garnish-

ment, attachment, or other legal process under any circumstances whatsoever.

PENALTY—CARRIER

SEC. 12. On the failure of any carrier to make any payment when due under the provisions of this Act, such carrier, unless excused by order of the Board, shall pay an additional 1 per centum of the amount of such payment for each month such payment is delayed.

OTHERS

SEC. 13. Any employee, other person, officer, or agent of a carrier subject to this Act, who shall willfully fail or refuse to make any report or furnish any information required by the Board in the administration of this Act or who shall willfully fail or refuse to make any accounting required under this Act, or who shall knowingly make any false or fraudulent statement or report required for the purpose of this Act, or who shall knowingly make or aid in making any false or fraudulent statement or claim for the purpose of receiving any award or payment under this Act shall be punished by a fine of not less than $100 nor more than $10,000 or by imprisonment not exceeding one year.

SEPARABILITY

SEC. 14. If any provision of this Act, or the application thereof to any person or circumstances, is held invalid, the remainder of the Act or application of such provision to other persons or circumstances shall not be affected thereby.

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